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SUPREME COURT OF THE UNITED STATES.

No. ~~300~~ 145

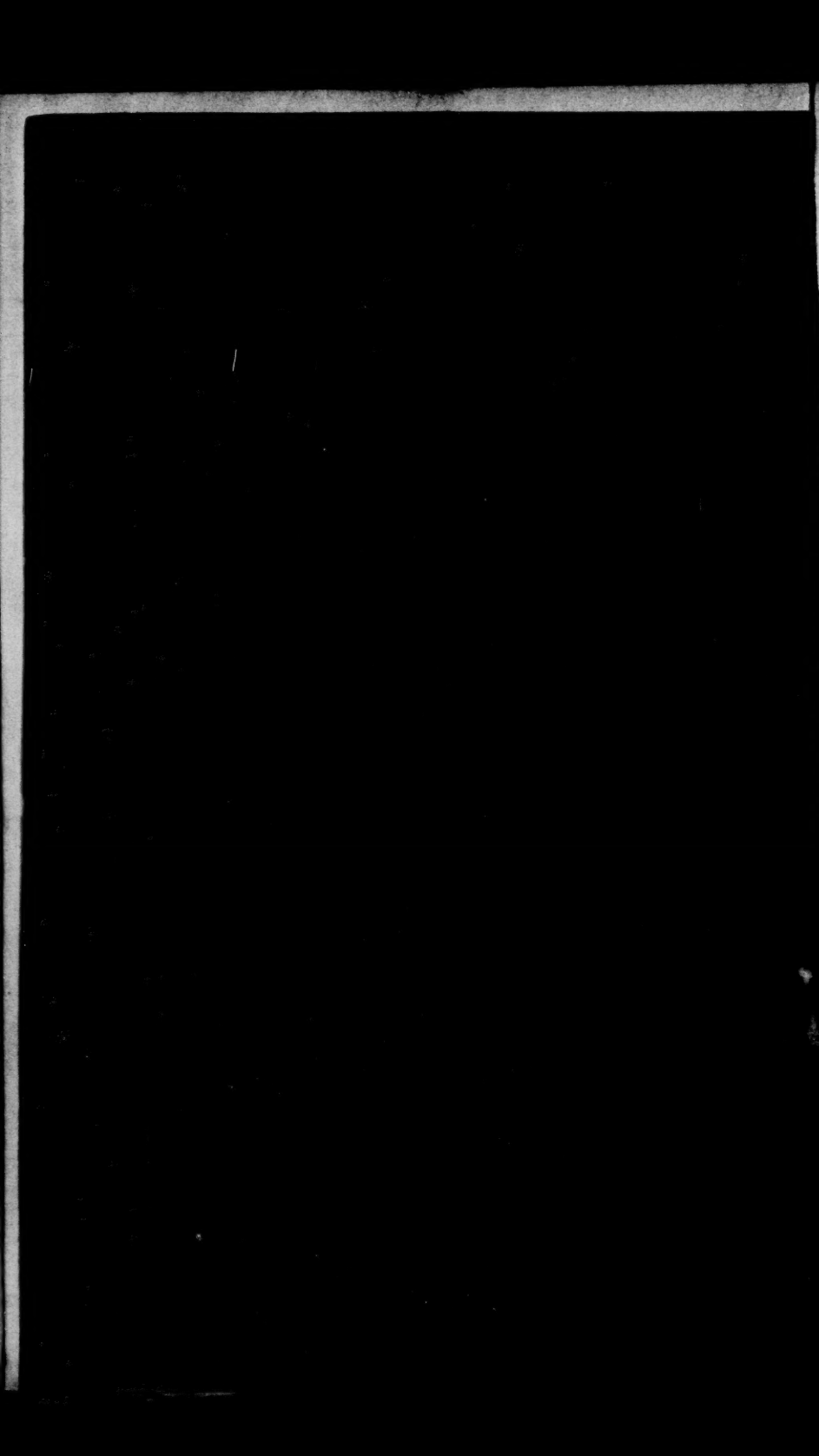
AINSWORTH R. SPOFFORD, APPELLANT,

vs.

JAMES B. KIRK, A. A. HOSMER, AND C. D. GILMORE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED NOVEMBER 1, 1875.



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INDEX.

	Original.	Print.
Bill of complaint	1	1
Bill of complaint, amendment to	13	4
Bill of complaint, Exhibit A. R. S. 1 to	14	4
Bill of complaint, Exhibit A. R. S. 2 to	15	4
Summons to answer	16	5
Restraining order	17	5
Petition of W. V. S. Wilson	18	6
Petition of W. V. S. Wilson, Exhibit to	21	6
Order of publication	22	7
Order to pay amount of claims into court	23	7
Answer of defendant Kirk	25	8
Answer of defendant Kirk to Wilson's petition	31	9
Exceptions to Kirk's answer	36	10
Exceptions to Kirk's answer to Wilson's petition	38	11
Amended answer of defendant Kirk	41	12
Amended answer of defendant Kirk, Exhibits A, B, and C to	47	13
Testimony for complainant	52	15
Deposition of A. R. Spofford	53	15
Deposition of H. A. Snow	69	19
Exhibits A, B, and C (letters)	84	23
Testimony for defendant	86	23
Deposition of James B. Kirk	86	23
E. L. Taylor	93	25
L. L. Lewis	97	26
Agreement of Kirk & Taylor, Exhibit A	102	27
Letter of Taylor to Kirk, Exhibit B	104	27
Letter of Taylor to Kirk, Exhibit C	105	28
Letter of Kirk to Hosmer & Co., Exhibit D	107	28
Cause certified to general term	110	29
Decree in general term	111	29
Appeal to Supreme Court United States	111	29
Appeal-bond to Supreme Court United States	112	29
Clerk's certificate	113	30

1 *Original bill of complaint.—Filed July* 1, 1874.

In the supreme court of the District of Columbia.

AINSWORTH R. SPOFFORD, *vs.* JAMES B. KIRK, A. A. HOSMER, AND C. D. Gilmore, doing business under the name, style, and firm of Hosmer and Company.	No. 3828.	Equity docket 13.

To the supreme court of the District of Columbia, sitting in equity:

Ainsworth R. Spofford, a resident of the District of Columbia, brings this his bill of complaint against James B. Kirk, a citizen of Culpeper Court-House, in the State of Virginia, and A. A. Hosmer and C. D. Gilmore, of the said District of Columbia, and who are doing business in the city of Washington, in said District, under the name, style,
2 and firm of Hosmer and Company, and thereupon your orator complains as follows:

1. That the defendant James B. Kirk, being the claimant of a large sum of money, to wit, the sum of $12,000, from the Government of the United States, for and on account of supplies furnished by him during the late war of rebellion to the Army of the said United States and for damages resulting from the military occupation and abuse of his property, heretofore, to wit, on the day of , A. D. 18 , formally intrusted the prosecution of said claim, before the commission regularly appointed and organised for such purpose, to the defendants, Hosmer and Company, and for that purpose constituted and appointed the said firm his attorneys or agents.

2. Your orator further shows that thereafterwards, to wit, on the 14th day of January, A. D. 1873, and while the said claim was pending
3 undecided before the said commission, the said defendant James B. Kirk, at Culpeper Court-House, in the State of Virginia, drew his certain order in writing upon his said agents, the said firm of Hosmer and Company, and therein and thereby directed them to pay to the order of one J. S. Wharton the sum of six hundred dollars out of whatever moneys might be coming into the hands of the said firm for the said defendant Kirk for supplies furnished and damages sustained by or on account of the military occupation aforesaid, and the said order in writing being duly subscribed by the said defendant James B. Kirk, was thereafterwards, to wit, on the 24th day of January, A. D. 1873, before the decision of said claim, presented to the said firm of Hosmer and Company, and by them thereupon duly accepted, by writing across the face thereof the words following, to wit:

4 "WASHINGTON, *Jan.* 24, 1873.

"Accepted; payment to be made out of any moneys received by us from the United States on the claim of said James B. Kirk and remaining in our hands after deduction and payment attorneys' fees in the case.

"HOSMER & CO."

(As will appear, reference being had to said written order, a copy of said acceptance herewith filed and marked "Exhibit A. R. S., 1," and prayed to be taken as part hereof.) And your orator further shows that thereafterwards, to wit, on the day last aforesaid, at the city of Washington aforesaid, the said order, bearing the acceptance aforesaid, was

for a valuable consideration duly endorsed and delivered by the said J. S. Wharton, the payee therein named as aforesaid, unto your orator,
5 whereby the said defendant, James B. Kirk, became indebted unto your orator, and promised, and to and with your orator agreed, that your orator should be paid the full sum of six hundred dollars, contents of said order, according to the terms thereof, and that the same shall be a valid charge against the proceeds of his aforesaid claim against the Government of the United States.

3. Your orator further shows that thereafterwards, to wit, on the said 14th day of January, A. D. 1873, at Culpeper Court-House, in the State of Virginia, the said defendant, James B. Kirk, drew his certain other order in writing upon his said agents or attorneys, the said firm of Hosmer and Company, and therein and thereby directed them to pay to one E. R. Taylor or order the sum of six hundred dollars out of whatever moneys might be coming into the hands of the said
6 firm for the said defendant Kirk for supplies furnished and damages sustained by him as aforesaid, and the said order in writing being duly subscribed by the said defendant James B. Kirk, was thereafterwards, to wit, on the 25th day of January, A. D. 1873, and before the decision of said claim, presented to the said firm of Hosmer and Company, and by them thereupon duly accepted, by writing across the face thereof the words and figures following, to wit:

"Accepted; payment to be made out of any moneys received by us from the United States on the claim of said James B. Kirk and remaining after deduction and payment of our attorneys' fees in the case, and also our acceptance of a similar order for the same amount in favor of D'r J. S. Wharton.

"HOSMER & CO.

"JAN'Y 25, '73."

7 (As will appear, reference being had to a copy of said written order and acceptance, herewith filed, marked "Exhibit A. R. S., Q," and prayed to be taken as part hereof. And your orator further shows that thereafterwards, to wit, on the day last aforesaid, at the city of Washington, in said District, the said order, bearing the acceptance aforesaid of the said firm of Hosmer and Company, agents and attorneys, as aforesaid, of the said defendant James B. Kirk, for a valuable consideration to the said E. R. Taylor in hand paid by your orator, was then and there duly indorsed and delivered unto your orator by the said E. R. Taylor, payee, as aforesaid, by reason and in consideration whereof the said defendant James B. Kirk then and there became liable and agreed with and promised your
8 orator to pay him the said sum of six hundred dollars, contents of said order, according to the tenor thereof, and that would be a valid charge upon the proceeds of his aforesaid claim against the Government of the United States.

4. Your orator further shows that being, as aforesaid, the bona-fide holder for value of the said several and respective orders in writing and acceptances, and the said claim of the said defendant James B. Kirk, whereon said orders are predicated, as aforesaid, having been adjudicated upon and allowed to a large amount, to wit, to the amount of $9,000, by the aforesaid commission, thereafterwards, to wit, on the 22d day of June, A. D. 1874, by an act of Congress, on that day approved, entitled "An act making appropriation for the payment of claims reported allowed

by the Commissioners of Claims, under an act of Congress of
9 March 3d, 1871," provision and appropriation was made for the payment of said claim by the Secretary of the Treasury of the United States; that thereupon, in pursuance of said appropriation, the said Secretary of the Treasury of the United States issued or caused to be issued a certain draft or warrant to the order of the said James B. Kirk for the amount so as aforesaid allowed him of his said claim, and caused the same to be delivered into the hands of the defendants, Hosmer and Company, as the attorneys, as aforesaid, of the said defendant James B. Kirk, and that the said firm of Hosmer and Company hold possession thereof at the present time.

Your orator further shows that since the issuance aforesaid of said draft or warrant he has repeatedly applied to the said defendant James B. Kirk and requested him specifically to perform or cause to be
10 performed his said several promises and agreements as aforesaid, and by indorsing said draft or warrant to enable his said attorneys, the said defendants, Hosmer and Company, to draw the money due thereon and to satisfy and pay the said several orders according to their respective tenors. And your orators well hoped that the said defendant James B. Kirk would have complied with such your orator's reasonable request, as in justice and equity he ought to have done but now so it is that the said defendant absolutely refuses so to do, and sometimes pretends that your orator, by reason of the amount allowed to said defendant being less than the sum originally claimed by him from the government, is not entitled to the entire and full sums of money in said accepted orders respectively mentioned. All which said pretence your orator is advised and verily believes that it is
11 the intention of the said defendant James B. Kirk, in order fraudulently to evade the performance of his aforesaid several and respective agreements with your orator, to acquire by suit or otherwise the possession of said draft or warrant, and that he actually will obtain possession of the same unless he be restrained therefrom by the order and injunction of this honorable court.

To the end, therefore, that the said James B. Kirk, and the said A. A. Hosmer and C. D. Gilmore, doing business as aforesaid under the name, style, and firm of Hosmer & Co., may be made parties defendant hereto, and be served with process; and that the said defendant James B. Kirk may be decreed specifically to perform his aforesaid several and respective contracts and agreements with your orator; and that he, the said James B. Kirk, his attorneys or agents, may be restrained from
12 receiving or seeking to obtain the possession of the said defendants, A. A. Hosmer and C. D. Gilmore, may be enjoined from delivering up the possession of the said Treasury draft or warrant to any person or persons whomsoever until the further order of the court; and that the said defendants, A. A. Hosmer and C. D. Gilmore, may, by decree of this court, be constituted and empowered, as attorneys in fact of the said James B. Kirk, defendant, aforesaid, to draw from the Treasury of the United States and receipt for the sum or sums of money due upon said draft or warrant, and out of the same to satisfy and pay to your orator the several and respective sums of money now due and payable upon the aforesaid accepted orders of the said defendant James B. Kirk; and that your orator may have such other and further relief as the nature of his case shall require, and to this honorable court may seem meet.

And your orator shall ever pray, etc.

A. R. SPOFFORD.

T. A. LAMBERT,
Solicitor and of Counsel.

13 I, Ainsworth R. Spofford, on oath say that I have heard read the foregoing bill by me subscribed, and that I know the contents thereof; that the facts therein stated upon my personal are true, and that the facts therein stated upon information and belief I believe to be true.

A. R. SPOFFORD.

Subscribed and sworn to before me July 11, 1874.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, J'R,
Ass't Clerk.

Amendment to bill.

The complainant hereby amends his said bill of complaint in the particulars, to wit:

1. By striking out the words "or assignment of interest" and the words "or assignment"—

At folio 2, lines 9 from top and 2 from the bottom;
At folio 3, lines 4 from top and 15 from top;
14 At folio 4, lines 5 from top and 2 from bottom;
At folio 6, lines 5 and 21 from top;
At folio 8, line 4 from bottom.

Also, the words "and whereof they are partial assignments," at folio 7, line 1 at top, and the words "or partial assignments thereof," at folio 8, line 11.

T. A. LAMBERT,
Sol'r for Compl't.

Exhibit A. R. S., 1.

CULPEPER C'T-HOUSE, V'A,
January 14th, 1873.

Mess'rs Hosmer & Co., of Washington City, D. C., will please pay to J. S. Wharton, or order, six hundred (600) dollars out of whatever moneys may be coming into your hands for me for supplies furnished and damages sustained by the U. S. Army during the war.

JAMES B. KIRK.

(Endorsed:) J. S. Wharton.

15 *Acceptance.*

Accepted; payment to be made out of any moneys received by us from the United States on the claim of said James B. Kirk and remaining in our hands after deduction & payment attorneys' fees in the case.

HOSMER & CO.

WASHINGTON, *Jan.* 24, 1873.

Exhibit A. R. S., 2.

CULPEPER C'T-HOUSE, V'A,
January 14th, 1873.

Mess'rs Hosmer & Co., of Washington City, D. C., will please pay to E. R. Taylor, or order, six hundred ($600) dollars out of whatever moneys may be coming into your hands for me for supplies furnished and damages sustained by the U. S. Army during the war.

(Signed) JAMES B. KIRK.

(Indorsed:) E. R. Taylor.

Acceptance.

Accepted; payment to be made out of any moneys received by
16 us from the United States on the claim of said James B. Kirk and remaining after deduction and payment of our attorneys' fees in the case, and also an acceptance of a similar order for the same amount in favor of D'r J. S. Wharton.

HOSMER & CO.

JAN'Y 25, '73.

Summons to answer.—July 11, 1875.

In the supreme court of the District of Columbia, July 11th, 1874.

AINSWORTH R. SPOFFORD, COMPLAINANT, *against* JAMES B. KIRK, DEFENDANT. } No. 3828. Equity docket 13.

The President of the United States to James B. Kirk, A. A. Hosmer and C. D. Gilmore, firm of Hosmer & Co.:

You are hereby commanded to appear in this court, at its first special term occurring twenty days after service of this subpœna, and
17 answer the exigency of the bill, under pain of attachment and such other process of contempt as the court shall award.

Witness: D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS,
Ass't Clerk.

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term, to which this writ is returnable; otherwise, the bill may be taken as confessed.

Restraining order.—July 11, 1874.

An original bill praying an injunction to restrain the defendants from receiving, receipting for, or delivering the warrant therein mentioned is this day filed. Hearing is fixed for the 16th July, 1874, at 11 o'clock a. m. Until further order, you are hereby restrained as prayed.

By order of the court.

A. WYLIE,
Justice.

18 *Marshal's return.*

Summoned A. A. Hosmer, of the firm of Hosmer & Co., and served notice for injunction on same.

A. SHARP,
Marshal.

JULY 11TH, 1874.

Petition of W. V. S. Wilson.—Filed July 13, '74.

In the supreme court of the District of Columbia the 12th day of July, 1874.

SPOFFORD
vs. } 3828. Equity.
JAMES B. KIRK ET AL.

The petition of William V. S. Wilson respectfully shows:

That he is the holder and owner of an order dated at Culpeper, V'a, March 3, '73, and directed to Hosmer & Co., whereby James B. Kirk directed them, the said Hosmer & Co., to pay to J. P. Wiggin the sum of $500 out of amount of claim allowed him by the Southern loyalist commission, which order was accepted by said Hosmer & Co., and endorsed by the said J. P. Wiggin to William A. MacNulty, and by the latter to your petitioner. That your petitioner purchased the said order in good faith and for a valuable consideration. (A copy of said order is filed herewith, and prayed to be made a part hereof.). That there is now in the hands of Hosmer & Co. a draft drawn by the Treasury of the United States for $, in payment of the claim of said James B. Kirk. That the order above recited is a proper charge against said draft, and that sufficient of said amount as is necessary to pay said order included in said draft is properly due and payable to your petitioner.

Your petitioner further states that he is informed and believes, and upon such information and belief charges, that said Kirk is attempting to get possession of said draft, with a view to defraud your petitioner out of his just debts.

Your petitioner prays to be made a party to this suit, and prays as in said original bill set forth.

And as in duty bound will ever pray, &c.

W. V. S. WILSON,
By JOHN N. OLIVER.

JOHN N. OLIVER,
Solicitor for Petitioner.

DISTRICT OF COLUMBIA,
County of Washington, ss:

John N. Oliver, being duly sworn, deposes and states that he is the agent and attorney for William V. S. Wilson, and that he had read the foregoing petition and knows the contents thereof, and that the facts therein set forth, of his own knowledge, are true, and those stated upon information and belief he believes to be true.

JOHN N. OLIVER.

Subscribed and sworn to before me this 13th day of July, 1874.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, J'R,
Ass't Clerk.

Exhibit to petition of W. V. S. Wilson.

$500.] CULPEPER, V'A, *March* 3, '73.

Mess'rs Hosmer & Co. will pay to J. P. Wiggin, out amount of claim allowed me by the Southern Loyalist Commission, five hundred dollars.

J. B. KIRK.

(Endorsed:)
Pay to W. A. McNulty.

J. P. WIGGIN.

Acceptance.

Accepted, payable out of monies received by us on the claim of James B. Kirk, remaining in our hands after payment of attorneys' fees and prior acceptances, amounting to $1,200.

HOSMER & CO.

It is this 13 day of July, 1874, ordered that the above petition be allowed to be filed.

By order of the court.

Test:

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, J'R.,
Ass't Clerk.

22 *Order of publication.—Filed July* 17, 1874.

In the supreme court of the District of Columbia.

AINSWORTH R. SPOFFORD *vs.* JOHN B. KIRK ET AL. } No. 3828. Equity docket 13.

On motion of the complainant, by T. A. Lambert, esq., his solicitor, it is ordered that the defendant, James B. Kirk, cause his appearance to be entered herein on or before the first rule-day, occurring forty days after this day; otherwise, the cause will be proceded with as in case of default.

A. WYLIE.

To Ainsworth R. Spofford and to T. A. Lambert, his solicitor:

Please take notice hereby that on Saturday, the 25th day of July, 1874, at 11 o'clock a. m., I shall move his honor, Judge Andrew Wylie, at the city hall, in the city of Washington, D. C., to dissolve an injunction or restraining order heretofore granted by the supreme court
23 of the District of Columbia, sitting in equity, in the chancery cause No. 3828 equity, wherein you, the said Ainsworth R. Spofford, is complainant, and myself and A. A. Hosmer & C. D. Gilmore (the latter doing business under the name, style, and firm of Hosmer & Co.) are defendants, at which time and place you may attend and protect your interest.

J. B. KIRK.

JULY 22, 1874.

Order to pay amount of claims into court.—Filed July 27, 1874.

In the supreme court of the District of Columbia.

A. R. SPOFFORD *vs.* JA'S B. KIRK ET AL. } No. 3828. Equity docket 13.

This cause coming on to be heard upon complainant's motion for interlocutory injunction, as prayed in his bill of complaint, and the same being argued by counsel and duly considered by the court, it is (by con-

sent of counsel) by the court, this 27th day of July, A. D. 1874, ordered that the sum of seventeen hundred and fifty dollars ($1,750), par-
24 cel of the proceeds of the claim in said bill mentioned, be, and the same is hereby, directed and required to be forthwith paid into the registry of this court, to await the final event of said cause, whenever and provided the said Hosmer & Co. shall, as attorneys in fact of the defendant Kirk, come into possession of the money payable by the United States to said Kirk, under the claim referred to in the complainant's bill, or an amount thereof sufficient to meet the claims of the several complainants, namely, the sum of $1,750, as aforesaid.

By the court.

A. WYLIE.

25 *Answer of Kirk.—Filed Aug.* 4, 1874.

In the supreme court of the District of Columbia.

AINSWORTH R. SPOFFORD, COMPLAINANT, *vs.* JAMES B. KIRK ET AL., RESPONDENTS. } No. 3828. Equity docket 13.

The separate answer of James B. Kirk to a bill of complaint heretofore exhibited against him and others in the supreme court of the District of Columbia, and therein numbered and entitled as above set forth.

This respondent, saving and reserving unto himself all just exception to said bill by reason of the many errors and insufficiencies therein contained, to said bill, or so much thereof as he is advised it is material for him to answer, answers and says:

26 That true it is that he made, executed, and delivered the said several orders, in the bill of said complainant mentioned and referred to, upon the defendant Hosmer & Co., and that the same were accepted, as he is informed, by said Hosmer & Co. in the manner set forth in said bill, but this respondent avers and expressly charges that the said orders and each of them were obtained from him without consideration and by and through the false and fraudulent representations of the parties to whom said orders were given, and that the same were obtained under such circumstances of falsehood and fraud as that they create no just or legal liability on the part of this respondent to pay the same. That this respondent, as soon as he discovered that said
27 orders had been obtained from him by false and fraudulent representations as aforementioned, notified the said defendants Hosmer & Co. that he repudiated and would not pay said orders so as aforesaid falsely and fraudulently obtained.

And this respondent, further answering says that the said orders in said bill mentioned were given by him prior to the decision or award of the commissioners of claims on the claim by him preferred against the Government of the United States referred to in the bill of the complainant, and upon the solemn assurance of the said Wharton and Taylor, then made to this respondent, that there was no doubt that his said claim would be allowed by said commissioners, and for a sum exceeding
28 twelve thousand dollars, of which said allowance so as aforesaid to be made, said Wharton and Taylor then and there falsely and fraudulently pretended to have certain knowledge. And said Wharton and Taylor, at and before the giving of said orders, fraudulently and falsely pretended and said that said award of twelve thousand dollars, or some greater sum, would in great measure result from the effective

aid and assistance rendered by them before said commissioners in behalf of this respondent, whereas in truth and in fact the amount actually awarded and allowed by said commissioners upon said claim was only eight thousand five hundred and fifty-six dollars and eighty cents; and this respondent avers and expressly charges that the state-
29 ments of the said Wharton and Taylor respecting their aid and assistance before said commissioners before mentioned were utterly false and untrue, and that at the time of the giving of said orders he believed said statements to be true, and he says that said orders were given because he did believe the said several statements to be true. That said Wharton and Taylor were not attorneys at law or attorneys for the presentation of claims before said commissioners, and this respondent has since been informed and verily believes that it was at no time possible for them, or either of them, either by the exercise of influence or in any other way to have aided him in the prosecution of his said claim before said commissioners.

30 Your respondent, if afforded an opportunity so to do, feels confident that he can fully prove the statements in this answer contained. He denies all fraud, combination, and conspiracy, and having fully answered, prays to be hence dismissed with his costs about this suit by him unjustly expended.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

This day personally appeared before me, a United States Commissioner of the said district, James B. Kirk, who, having been by me duly sworn, on his oath saith that the facts, matters, and things in the foregoing answer set forth, so far as they are stated as of his own
31 knowledge, are true, and so far as they are stated on information and belief he verily believes them to be true.

In witness whereof I have hereunto set my hand and affixed my official seal this 3rd day of August, A. D. 1874.

[SEAL.] D. P. STALLARD,
U. S. Comm'r Eastern District of Virginia.

Answer of Kirk to petition of Wilson—Filed Aug. 8, 1874.

In the supreme court of the District of Columbia, of the twelfth day of July, A. D. 1874.

AINSWORTH R. SPOFFORD, COMPL'T,
vs
JAMES B. KIRK ET AL., RESP'TS. } No. 3828. Equity docket 13.

The separate answer of James B. Kirk, one of the respondents in the above-entitled cause, to the petition of William V. S. Wilson, filed in said cause on the thirteenth day of July, A. D. 1874.

32 This respondent, saving and reserving to himself all right of exception to the petition of said petitioners by reason of the many errors and insufficiencies therein contained, to said petition, or to so much thereof as he is advised it is material for him to answer, answers and says:

That true it is this respondent made and gave the order in said petition mentioned and described in manner as therein set forth; but your respondent says that said order was obtained from him, and he was in

duced to give the same, by and through the false and fraudulent representations of one William A. McNulty, to whom and for whose use and benefit said order was given. That said William A. McNulty
33 falsely and fraudulently represented to this respondent that he, the said McNulty, knew that the claim of this respondent in said petition mentioned would be allowed for the sum of twelve thousand dollars, or some greater sum, and that said allowance so as aforesaid to be made was in large measure to be influenced and brought about by the effective aid and influence of said William A. McNulty before the loyal claims commissioners in that behalf given and used. Whereas in truth and in fact the said commissioners only allowed the sum of eight thousand five hundred and fifty-six dollars and eighty cents on said claim, and this respondent is informed and verily believes that the said McNulty never did, in any way or manner whatsoever, aid in procur said allowance, or influence the same.

34 And this respondent, further answering, says that the said William A. McNulty was at the time of the giving of the said order, and for a long time before and after the giving of the same, in the employment and service of the United States, to wit, as postmaster at the town of Culpeper, in the State of Virginia, and as such postmaster was prohibited and debarred by law from prosecuting or being interested directly or indirectly in the prosecution of any claim whatsoever against the United States.

Your respondent denies all combination or conspiracy in this matter, and having fully answered, prays that he may be hereof dismissed and discharged by the court with his costs and charges by him about this suit unjustly expended.

JAMES B. KIRK.

L. L. LEWIS,
Def'ts' Solicitor.

35 UNITED STATES OF AMERICA,
State of Virginia, ss:

On this 7th day of August, A. D. 1874, before me, David P. Stallard, a commissioner of the circuit court of the United States in and for the eastern district of Virginia, personally came James B. Kirk and signed the foregoing instrument, and being by me duly sworn, on his oath saith that the facts, matters, and things in the foregoing answer set forth, so far as the same are stated as of his own knowledge, are true, and so far as the same are stated on information and belief he verily believes them to be true.

In witness whereof I have hereunto set my hand and affixed my official seal this 7th day of August, A. D. 1874.

[SEAL.]

D. P. STALLARD,
U. S. Comm'r Eastern District of Virginia.

Compl't's exceptions to ans. of Kirk.—Filed Sep. 1, 1874.

In the supreme court of the District of Columbia.

AINSWORTH R. SPOFFORD
vs.
JAMES B. KIRK ET AL. } No. 3828. Eq. doc. 13.

Exceptions taken by the said complainant to the insufficient answer of the said defendant James B. Kirk.

1. For that the said defendant hath not to the best of his knowledge,

information, and belief answered and set forth when, where, under what circumstances, upon what consideration, and to whom the said several orders in said bill mentioned were transferred by the respective payees, J. S. Wharton and E. R. Taylor, whether such transfer was effected by endorsement and delivery or by delivery only; or whether the
37 complainant did or did not become the holder of said several orders in good faith for value, and whether with or without notice of pre-existing equities between the said defendant and the said respective payees, J. S. Wharton and E. R. Taylor.

For that the said defendant's answer is impertinent, immaterial, and in no particular responsive to the allegations of the complainant's said bill, in that the said answer is confined wholly to the *amount* of alleged facts tending to effect the validity of said several orders as between the said defendant and the said J. S. Wharton and E. R. Taylor, payees respectively as aforesaid, and fails entirely to make discovery whether the said defendants ought or wherefore he ought not to be decreed to
38 perform specifically his agreement as set forth and prayed in said bill of complaint in respect of the complainant.

In all which particulars the said complainant excepts to the answer as evasive, imperfect, and insufficient, and humbly prays that the said defendant may be compelled to put in full and sufficient answer thereto.

T. A. LAMBERT,
Sol'r and Counsel for Complainant.

Exceptions of Wilson to ans. of Kirk.—Filed Sept. 1, 1874.

In the supreme court of the District of Columbia.

AINSWORTH R. SPOFFORD *vs.* JAMES B. KIRK ET AL. } No. 3828. Equity doc. 13.

Exceptions taken by W. V. S. Wilson to the insufficient answer of the said defendant James B. Kirk.

39 1. For that the said defendant hath not to the best of his knowledge, information, and belief answered and set forth when, where, under what circumstances, upon what consideration, and to whom the said order in said petition mentioned was transferred by the payee, J. P. Wiggin; whether such transfer was effected by indorsement and delivery or by delivery only; or whether the petitioner did or did not become the holder of said order in good faith for value and without notice of pre-existing equities between said defendant and the said payee, J. P. Higgins.

2. For that the said defendant's answer is impertinent, immaterial, and in no particular responsive to the allegations of the petitioner's said petition, in that the said answer is confined wholly to the aver-
40 ment of alleged facts tending to effect the validity of said order as between the said defendant and the said J. P. Wiggin, and fails entirely to make discovery whether the said defendant ought or wherefore he ought not be decreed to peform specifically the agreement as set forth and prayed in said petition and bill of complaint.

In all which particulars the said petitioner excepts to the answer as evasive, imperfect, and insufficient, and humbly prays that the said defendant may be compelled to put in full and sufficient answer thereto.

JOHN N. OLIVER,
Solicitor for W. V. S. Wilson, Petitioner.

41 *Amended answer of def't Kirk.—Filed Oct.* 21, 1874.

In the supreme court of the District of Columbia.

AINSWORTH R. SPOFFORD
vs.
JAMES B. KIRK ET AL. } In equity No. 3828. Equity docket 13.

The separate amended answer of James B. Kirk, one of the defendants in the above-stated suit, to the bill of complaint filed therein.

This defendant, saving and reserving to himself all just right of exception to said bill by reason of the many errors and insufficiencies therein contained to the said bill, or to so much thereof as he is advised it is necessary for him to answer, answers and says:

That true it is that he gave the two several orders in the complainant's bill mentioned and set forth to the persons therein named; but this defendant says that he ought not to be compelled to pay the same, or any part thereof, because the same were obtained from him by
42 fraud and false pretences. That on the 15th day of December, A. D. 1872, this defendant entered into a written contract with one E. R. Taylor (which said contract is hereto annexed and marked "Exhibit A," and which this defendant prays may be taken as a part of this answer) respecting the prosecution of a certain claim of this defendant against the United States, before the Southern Claims Commission, by which contract, reference being thereunto had, it will appear that this defendant agreed to pay to said Taylor, for his services as counsel respecting said claim, ten per centum on the sum allowed thereon, provided that said sum amount to twelve thousand dollars or more; and it is by said Taylor in said contract agreed that should the award be a less sum than twelve thousand dollars, the said Taylor is to waive all claims for compensation for any service h · may render.
43 That said Taylor afterwards, by his writing on the back of said contract, agreed to allow to one D'r J. S. Wharton one-half of what he should receive from M'r Kirk, as by reference to said writing will more fully appear.

That afterward, to wit, on the fourteenth day of January, A. D. 1873, the said Taylor wrote to this defendant a certain letter, which is hereunto annexed and marked "Exhibit B," and which letter this defendant prays may be taken as a part of this answer, in which said letter the said Taylor falsely and fraudulently represented to this defendant that the sum of fifteen thousand dollars, or some greater sum, had been awarded on said claim of defendant, as by reference to said letter will more fully appear.

That the said Wharton, well knowing the intention of said Taylor to defraud this defendant, as by the letter of said Wharton, addressed to one Judge Taylor (know' to this defendant as father of said
44 E. R. Taylor), which said letter is hereto annexed and marked "Exhibit C," and which this defendant prays may be taken as part of this answer, will appear, in pursuance of said fraudulent intention, drew the two said orders in complainant's bill mentioned, which this defendant, believing the said false and fraudulent pretences, signed and delivered to said Judge Taylor, said orders to be delivered to said Wharton and said E. R. Taylor; but this defendant says that in truth and in fact the sum of eight thousand five hundred and fifty-six dollars and eighty cents was all the money allowed by said commission on said claim, and that no greater sum was ever allowed thereon.

And this defendant, further answering, says that at the time of the making of said contract with said Taylor, and of the making and signing of said orders, the said E. R. Taylor was an officer in the civil
45 service of the United States, to wit, a postal-car clerk, and, as such officer, was debarred and prohibited by law from being interested in any claim against the United States.

That he is informed and believes that said Taylor and the said Wharton never rendered any assistance whatever, as counsel or otherwise, in the prosecution of said claim before said commissioners.

2d. And this defendant further answering says, that he ought not to be decreed to pay the said orders, or any part thereof, as prayed in the complainant's bill, because the same were obtained by fraud and false pretences, as above set forth, because also the same were given without consideration, and because also the same being orders given upon the happening of an uncertain contingency which might never come to pass, and accepted without notice to this defendant, were not bills of exchange or commercial paper, and the subsequent en-
46 dorsers or holders thereof took the same subject to all the equities existing between this defendant and the said Taylor and Wharton.

This defendant has no knowledge, and is not informed when, where, and under what circumstances, upon what consideration, or to whom the said orders were transferred by the payees, or whether such transfer was by endorsement and delivery, or by delivery only, or whether the complainant did or did not become the holder thereof in good faith for value, and without notice of pre-existing equities between this defendant and said payees; but he said that said complainants took said orders subject to such equities as did exist between this defendant and said payees.

As denies all fraud and conspiracy, and having fully answered said bill, prays that he may be hereof dismissed, with his costs and charges by him about this suit expended.

JAMES B. KIRK.

47 U. S. OF AMERICA,
Eastern District of Va.

On this 17th day of October, A. D. 1874, James B. Kirk, whose name is signed to the foregoing answer in chancery, personally appeared before me in my district aforesaid, and made oath in solemn form that the statements and allegations therein contained are true to the best of his knowledge and belief. Given under my hand and official seal the day and year above written.

D. P. STALLARD,
U. S. Com'n'r Eastern District of Virginia.

Exhibit A to def't Kirk's answer.

Memorandum of agreement entered into this 18th day of December, 1872, between Ja's B. Kirk, of the first part, and E. R. Taylor, of the second, witnesseth:

That the said Ja's B. Kirk, having employed said Taylor as counsel in claim now pending before the Southern Claims Commission, agrees
48 and binds himself to pay said Taylor ten per cent. on amount allowed by commission, provided the gross amount of the award is twelve thousand dollars or more; should the award be a less

sum than twelve thousand dollars, the said Taylor wa'ves all claim for compensation for any services he may render.

JAMES B. KIRK.
E. R. TAYLOR.

In consideration of services rendered & assistance to be given in the prosecution of M'r Kirk's claim, I have agreed to allow D'r J. S. Wharton one-half of what I received from M'r Kirk.

E. R. TAYLOR.

Exhibit B.

WASHINGTON, D. C., *Jan.* 14*th*, 1873.

FRIEND KIRK: I am about starting a drug-store here, and am short of funds. Your claim having passed for fifteen thousand dollars,
49 I have concluded to ask you to give me an order for six hundred dollars. D'r Wharton tells me you are willing to give an order for six hundred dollars apiece (as per contract to give ten per cent. if the claim were allowed for twelve thousand dollars).

M'r Richards, of the firm of Hosmer & Co., tells me the claim has been allowed for fifteen or sixteen thousand dollars; he is not positive which. Of course, the order would be of no use if the claim has not been allowed for twelve thousand dollars; but I have positive assurance your claim has been allowed for fifteen thousand dollars, probably sixteen thousand. I would not ask you for the order now, but for the fact that I want to use it as collateral security to buy goods. I know you will help me in this. My father, who will hand you this, will explain anything you don't understand about this.

Hastily, &c.,

E. R. TAYLOR.

50 *Exhibit C.*

WASHINGTON, *Jan'y* 14*th*, '73.

DEAR JUDGE: When I saw M'r Kirk in Culpeper he told me he was willing to give Ned and myself an order for $600 each, and pay us the balance promised according to contract enclosed, when the full amount of his claim shall be ascertained. As it is very important for us to have the orders at once, we have concluded to send you the contract and get you to go to the C. ho. to-day without fail, and see M'r Kirk and get him to sign the enclosed orders for us and return them to us to-morrow. Ned has written Kirk a letter which you will hand him, and which explain' everything to him. You can read over the contract and then give it to Kirk, and request him to hold it until the case is decided.

Please do not fail to see Kirk to-day, as it is very important that the matter should be attended to at once.

And oblige yours, &c.,

J. S. WHARTON.

51 Don't fail to see Kirk this evening, and don't show him this.

E. R. TAYLOR.

P. S.—If Kirk won't give the order, don't give up the contract. Let us hear from you to-morrow.

J. S. W.

52 *Testimony for complainant.*

In the supreme court of the District of Columbia.

SPOFFORD *vs.* KIRK ET AL. } In equity. No. 3828. Doc. 13.

For plaintiffs.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Be it remembered that at an examination of witnesses, begun and on the 13th day of November, A. D. 1874, and continued from time to time by adjournment, until the 14th day of November, A. D. 1874, when the within depositions were taken, I, John J. Johnson, an examiner in chancery, did cause to be personally present at the office of T. A. Lambert, esq., Columbian Law Building, in the city of Washington, in said District, the within-named witnesses, to testify on the part and be-
53 half of the plaintiff in a certain cause now depending in the supreme court of the District of Columbia, wherein Spofford is complainant and Kirk et al. defendant'.

JOHN J. JOHNSON,
Exam'r.

Deposition of A. R. Spofford.

SPOFFORD *vs.* KIRK ET AL. } 3828. Eq. doc. 13.

Nov. 13, 1874.

The following deposition was taken by consent:

AINSWORTH R. SPOFFORD, being sworn, says: I reside in this city. I am plaintiff. I am Librarian of Congress. I am not acquainted with Kirk personally. I only know him through his orders on Hosmer & Company. I am well acquainted with Hosmer & Co., as a firm and as individuals. I have no direct knowledge as to where Kirk re-
54 sides. I have always supposed he resides in Culpepper Court-House, V'a, as his orders are dated there. Hosmer & Co. are well known to me as doing business in this city as attorneys and claim-agents. In the month of February, 1873, two orders, signed by James B. Kirk, one of the defendants, for the amount of $600 each, dated at Culpepper, V'a, Court-House, Jan'y 14, 1873, and drawn to the order of J. S. Wharton and E. R. Taylor, respectively, being the same copies whereof are filed with the bill, and marked Exhibits A. R. S., 1, and A. R. S., 2, were offered to me for discount. The statement was made by the party holding them that M'r Kirk and the endorsers were in great need of money, and as the claim against which the orders were drawn, although passed by the commissioners of the Southern claims,
55 had not yet passed Congress, they were anxious to discount the same. At the same time they exhibited to me a letter signed by Hosmer & Co., by whom both the orders had been formerly accepted, on the condition recited, namely, "payment to be made out of any moneys received by us from the United States and the claim of said

James B. Kirk." This letter, marked "Exhibit A," is hereto annexed and made part of my deposition.

On the faith of the statement of this letter of Hosmer & Co., dated February 10, 1873, that the Southern Claims Commission allowed James B. Kirk something over $9,000, and that there would be several thousand dollars due M'r Kirk after paying these two drafts and their fees, I purchased the said drafts. I became the holder of the same in good
56 faith, having reason to believe that they were drawn in good faith by James B. Kirk, out of money actually due him, accepted in good faith by Hosmer & Co., and would be paid in good faith whenever an appropriation should be made by Congress to carry out the award of the Commissioners of Claims. These orders were offered to me by a firm of brokers named Mattingly & Wheeler, who acted as agents for the endorsers of these orders. I don't remember precisely the date when I was first advised the defendant Kirk intended to contest the payment of these orders, but it was at least a year after I purchased them—not, in fact, until after the passage of the act of Congress making an appropriation for the payment of James B. Kirk's claim in full as awarded by the commissioners.

I am aware of the fact that the defendants Hosmer & Co. were
57 the attorneys for Kirk in the prosecution of his claim. I informed Capt. H. A. Snow, of the firm of Hosmer & Co., of the fact of my purchasing these orders a few months after I became the purchaser of them, and intimated that I should look to their firm for the payment of the acceptance of Hosmer & Co. whenever they should receive from the Treasury, as attorneys for James B. Kirk, the amount awarded him by Congress. Capt. Snow immediately recognized the validity of both of said orders. I received no intimation at that time from any member of the firm, nor until after the passage of the act of Congress heretofore testified to, that the defendant Kirk designed to contest the payment of these orders.

A. R. SPOFFORD.

58 A. R. SPOFFORD recalled in chief:

Q State whether before you instituted legal proceedings any proposition was made to you through the attorneys of M'r Kirk looking to the setting apart of any portion of the proceeds of the draft to await an amicable adjustment of your claim; if so, what was done by you in relation thereto, if anything?

(The defendant Kirk, through his counsel, objects.)

That proposition was not made in writing, but verbally. I declined it on two grounds: First, that it would put it in the power of Kirk, after drawing nearly all the money, to tie up my share of it for an indefinite period; 2nd, that leaving the matter to arbitration might countenance the idea that there were some doubt as to the entire legality of my
59 claim, and as I then had, and have now, no doubt on that point, I thought best to decline the proposition.

(Objected to as not a statement of facts, but argumentative.)

I will add that Col. Hosmer himself intimated to me that the acceptance of this proposal might protract a settlement.

Q. Before the institution of these proceedings, were you made aware in any shape or form or through any source of the ground stated by Kirk in his amended answer in resistance to your claim, namely, unless his claims were allowed to the extent of $12,000 the orders you hold would be void?

A. I was, if I remember rightly, informed in Col. Hosmer's office that

against all forfeitures or penalties incurred or adjudged against said last-namd parties in consequence of any default or failure made or permitted after the date hereof in the construction, maintenance, or operation of said road or telegraph embraced in this agreement; and the said parties of the second part further agree that they will repay any and all moneys necessarily expended up to the date of these presents for engineers, surveys, plats, and profiles by the parties of the first part upon the above-named line of railroad, on the delivery to them of said engineers' maps, plats, and profiles upon which said expenditures were made.

In testimony whereof, the parties hereto subscribed their names and affixed their seals by order of their respective board of directors.

On behalf of the Atchison, Topeka and Santa Fe Railroad Company—

{Atchison, Topeka and Santa Fe R.R. Co. Seal.}

SAMUEL C. POMEROY, [L.S.]
President.
WILLIS GAYLORD, [L.S.]
Secretary.

82 On behalf of the Union Pacific Railroad Company, Southern Branch—

R. McBRATNEY, [L. S.]
N. S. GOSS, [L. S.]
Agents and Attorneys.

Which said answer was endorsed as follows: District court. The Kansas Pacific Railway Co. vs. The Missouri, Kansas & Texas Railway Company. Answer. Filed 20th April, 1872. T. C. Sears. Thomas Hookey, clerk.

And thereupon, to wit, on the 2d of October, A. D. 1872, the following reply was filed in the 8th judicial district:

STATE OF KANSAS, }
COUNTY OF DAVIS. }

THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY CO. } Reply.

83 The plaintiff replies to the answer of the defendant, and—

I. The plaintiff denies each and every allegation of the defendant in its answer contained.

II. The plaintiff does not admit, but denies, that the Atchinson, Topeka and Santa Fe Railroad Company did, on the 19th day of March, 1866, or at any other time, execute to and with the defendant the agreement specified and set forth by the defendant in its answer; the plaintiff says that at the time mentioned in said answer, to wit, on the 19th day of March, 1866, the defendant was not incorporated, and the said Atchison, Topeka and Santa Fe Railroad

Company had not then the right, power, and authority to execute such agreement, and the same, if ever executed, was without authority of law and is void.

III. For further reply to the 8th and 9th paragraphs of the answer the plaintiff says that the defendant, having claimed under the pretended assignments of the 19 March, 1866, and accepted the patents from the Governor of the State of Kansas purporting to have been executed under and by virtue of the authority
84 of the acts of Congress therein mentioned, is estopped to allege and maintain title against this plaintiff by reason of anything contained in the act of Congress of July 25th, 1866, mentioned in said paragraphs, and plaintiff further says that all the lands in the petition mentioned and for which this suit is brought had been withdrawn, by order of the President of the United States, from sale and settlement under and pursuant to the acts of Congress in the petition mentioned, and the railroad of the plaintiff had been located and constructed along and adjacent to said lands long before the defendant definitely located its line along and adjacent to said lands, and the President pursuant to said acts of Congress had accepted said road and directed patents for the said lands in controversy to be executed to the plaintiff.

IV. And for further reply to the answer of the defendant in the first (1st), second (2d), third (3rd), fourth (4th), fifth (5th), sixth (6th), and seventh (7th) paragraphs contained, the plaintiff says that the defendant did not, and has not, neither has the State of Kansas or other party, constructed the line of railroad described and provided to be constructed by the acts of Congress of
85 1863 and 1864 in said paragraphs mentioned; but the road which the defendant has constructed is not located as in said acts required, but is altogether another and different road, and the said road so constructed by said defendant was not definitely located until long after the location and construction of plaintiff's road, and the lands involved in this suit are not the same lands or part and parcel of the same which were upon conditions embraced in the grant to the State of Kansas by the acts of 1863 and 1864; but they are lands not embraced within the limits of said grant, and were expressly excepted out of said acts and were embraced in the grants to the plaintiff, and the plaintiff is entitled to them as in the petition is alleged and claimed.

JOHN P. USHER,
EDGAR W. DENNIS,
Attys. for Plaintiff.

STATE OF KANSAS, } *ss.*
DAVIS COUNTY. }

John P. Usher, being duly sworn, says the allegations con-
86 tained in the second count of this reply, wherein it is denied that the defendant is an incorporated company and that a

certain alleged contract was executed, are in substance and fact true, as deponent believes.

JOHN P. USHER.

Sworn to and subscribed before me, this 17th day of December, 1872.

[SEAL.] THOMAS HOOKEY, *Clerk.*

Whereupon, to wit, on the 29th day of January, A. D. 1873, the defendant made and filed the following motion, which was granted by the court.

DISTRICT COURT, } *ss.*
DAVIS COUNTY. }

KANSAS PACIFIC RAILROAD COMPANY
agt.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

And now comes the defendant and moves the court for permission to amend his answer, and the plaintiff consenting thereto, it is ordered that said answer be amended, which is accordingly done.

And it is further ordered that the reply of the plaintiff to the original answer heretofore filed be treated as the reply to
87 defendant's amended answer.

In the Eighth Judicial Court of the State of Kansas, Davis County.

THE KANSAS PACIFIC RAILWAY COMPANY
agt.
THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY. } Amended answer.

And now comes the said defendant, the Missouri, Kansas and Texas Railway Company, and for answer to the petition of the plaintiff in the above-entitled action, admits the incorporation of the plaintiff as therein alleged, admits the passage of the various acts of Congress of the United States, as is also alleged, but denies that the plaintiff acquired any interest in the lands mentioned in his petition by virtue of said acts, or any of them, and alleges further that said plaintiff never performed the conditions and requirements of said statutes, or any or either of them, as to time or manner of performance; admits the correctness of the papers and exhibits attached to said petition, and denies each and every other
88 allegation therein contained excepted hereinafter admitted.

The said defendant for further answer says:

1st. That it is a corporation duly created and organized under and by virtue of the laws of the State of Kansas; that defendant was incorporated by virtue of the laws aforesaid on the 20 day of September, A. D. 1865, under the name of the Union Pacific railroad, southern branch, to construct a railway commencing at or near

Fort Riley, or the juncture of the Republican and Smoky Hill Forks of the Kansas river, and on the line of the Union Pacific railway, E. D., running thence via Clark creek and the Neosho river to a point at or near where the southern boundary line of the State of Kansas crosses the Neosho river; that by competent authority, and in accordance with law, the name of said corporation was subsequently changed to the Missouri, Kansas and Texas Railway Company, this defendant.

2nd. That on the eleventh day of February, 1859, the Atchison, Topeka and Santa Fe Railway Company was duly incorporated by the legislature of the then Territory of Kansas, and was from that time up to and including the times hereafter stated invested
89 with all the powers, privileges, and immunities incident to that class of corporation—for more particular description of said powers, privileges, and immunities, reference is hereby made to the act of incorporation passed by the legislative assembly of said territory and approved by the governor thereof on the 11th day of February, A. D. 1859.

3rd. That an "Act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said state" was passed by the Congress of the United States and duly approved by the President on the 3rd day of March, A. D. 1863, which provided, among other things, as follows, viz:

That there be, and is hereby, granted to the State of Kansas for the purpose of aiding in the construction * * * * * * * * * * * * * * * Second, of a railroad from the city of Atchison via Topeka, the capital of said state, in the direction of Fort Union and Santa Fe, New Mexico, with a branch from where this last-named road crosses the Neosho down said Neosho valley to the point where the said first-named road enters the Neosho valley, every alternate section of land designated by odd numbers for ten sections
90 in width on each side of said roads and each of the branches.

Said act further provided that "in case it should appear that the United States have, when the lines or route of said roads and branches are definitely fixed, sold any section, or any part thereof granted as aforesaid, or that the right of pre-emption, or homestead settlement, has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlement have attached as aforesaid, which lands thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid.

91 Section third of said act provided that the lands thereby granted to said state should be subject to the disposal of the legislature of the State of Kansas for the purpose aforesaid and no other, and it was further provided in what manner the legislature should dispose of the same.

4th. That the legislature of the State of Kansas passed an act accepting said grant of lands, which said act was duly approved by the Governor of the State of Kansas on the 9th day of February, 1864; in said act it was further provided as follows, viz:

Sec. 3. In consideration that the Atchison, Topeka and Santa Fe Railway Company, formerly the Atchison and Topeka Railway Company, shall construct a railroad from the city of Atchison, via Topeka, to the western line of said state, in the direction of Fort Union and Santa Fe, New Mexico, with a branch from where said road crosses Neosho, down the said Neosho valley to the point where the Leavenworth, Lawrence and Fort Gibson enters said Neosho valley, the State of Kansas hereby agrees to grant, bargain, and sell to said

92 Atchison, Topeka and Santa Fe Railway Company all that portion of the lands granted to this state by the above-named act of Congress applicable to the construction of the herein above-described railroad and branch thereof, and which shall be selected and located in conformity with the provisions of the above-named act of Congress; and the said state does further agree, and it is hereby enacted, that whenever said Atchison, Topeka and Santa Fe Railroad Company shall complete any consecutive miles of either said road or branches required by said act of Congress, the governor of this state shall by patent convey to said Atchison, Topeka and Santa Fe Railroad Company all the lands granted as aforesaid, and which shall be situated opposite to and within the limit of ten miles of the line of said section of road thus completed, extending along the whole length of said completed section and no further, and so from time to time until said road and branches shall be completed as required by the act of Congress; and whenever said road and branches shall be thus completed the governor of this state shall con-

93 vey to said company all the remaining lands granted by said act of Congress and applicable to the construction of said road and branches, provided, however, that an agreement for the sale of said lands and all conveyances thereof shall be for the uses and purposes and subject to the conditions, reversions, and provisions set forth and contained in said acts of Congress and in this act; and provided further, that if the Congress of the United States shall, on or before the 4th day of March, 1866, consent that the Neosho valley branch of the above-named road may be extended so as to intersect the Union Pacific railroad, eastern division, at or near Fort Riley, and shall make a grant of land for such extension, of like amount with that granted per mile for the construction of the herein above-named principal road, then the said Atchison, Topeka and Santa Fe Railroad Company shall proceed to construct such branch

to such intersection on the terms and conditions herein above described applicable to the construction of such main road. By sec. 4 of said act it was provided as follows, viz:

94 "Each of said companies (meaning thereby the said Atchison, Topeka and Santa Fe Railroad Company and the Leavenworth, Lawrence and Fort Gibson Railroad Company) shall file in the office of the secretary of state within six months of the passage of this act, a copy of acceptance by the board of directors of such company of the provisions of this act, duly certified under the seal of such company, and in default thereof all grants and provisions herein contained shall, as to the company so failing, cease and be void."

5th. That the said Atchison, Topeka and Santa Fe Railroad Company duly accepted the provisions of said last-named act, and did in all respects comply with the provisions thereof.

6th. That subsequently an act was passed by the Congress of the United States, approved July 1st, 1864, entitled "An act making an additional grant of lands to the State of Kansas to aid in the construction of railroad and telegraph lines, in which, among other things, it was enacted: That there be and hereby is granted to the State of Kansas, to aid in the construction of a railroad and

95 telegraph line from Emporia via Council Grove to a point near Fort Riley on the branch Union Pacific railroad in said state, every alternate section of land designated by odd numbers for ten sections in width on each side of said road: Provided, That this grant shall be subject to all the provisions, restrictions, and limitations in regard to selection and location of land and otherwise of an act of Congress approved March 3d, eighteen hundred and sixty-three, entitled an act for a grant of land to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said state. * * * That the distance from Emporia via Council Grove to a point near Fort Riley on a branch of the Union Pacific railroad, eastern division, was eighty-one miles, and that the route or line of said road was by the said act definitely fixed and determined.

7th. That by an agreement duly made and entered into between the said Atchison, Topeka and Santa Fe Railroad Company and this defendant (then known as the Union Pacific Railroad, Southern

96 Branch) on the 19th day of March, 1866, the said Atchison, Topeka and Santa Fe Railroad Company bargained, sold, and assigned, transferred, and set over unto this defendant, its representatives and assigns, all the right, title, and interest, franchises, authorities, privileges, immunities, and liberties held, acquired, possessed, and enjoyed for constructing, maintaining, operating, and enjoying a railroad from the Union Pacific railroad, eastern division, from a point at or near Fort Riley down the Neosho valley to where the Leavenworth, Lawrence and Fort Gibson railroad may enter the Neosho valley, which right, title, interests, franchises,

authorities, immunities, and liberties accrued to and became vested in the said Atchison, Topeka and Santa Fe Railroad Company by virtue of its acceptance of the provisions of the act of the legislature of the State of Kansas hereinbefore referred to and approved February 9, 1864, and did authorize and empower this defendant or company, with the requirements and conditions contained in the various legislative acts before cited, to receive, hold, and enjoy any lands, property, effects applicable to the construction of a railroad between
97 the points herein named as fully and completely as the said Atchison, Topeka and Santa Fe Railroad Company might have done had it performed all of said requirements and conditions.

That in consideration of such sale and transfer as aforesaid this defendant agreed that it would well and faithfully do and perform all and singular the duties, obligations, and requirements imposed upon said Atchison, Topeka and Santa Fe Railroad Company under the several acts of Congress and of the legislature of the State of Kansas, as hereinbefore cited, and that it would construct, maintain, and operate a railway and telegraph from a point on the Union Pacific railroad, eastern division, at or near Fort Riley down the Neosho valley to where the Leavenworth, Lawrence and Fort Gibson railroad entered said valley, within the time required and upon the conditions prescribed in said acts, all of which covenants, agreements, and conditions this defendant has duly, promptly, and fully performed, kept, and complied with. A copy of said agree-
98 ment is hereto attached, made a part thereof, and marked Exhibit "A." That said agreement was fully approved, ratified, and confirmed by the State of Kansas by an act of the legislature approved February 26, 1867.

8th. That on the 25th day of July, 1866, the Congress of the United States granted to the State of Kansas, to aid this defendant (designated in the grant as the Union Pacific Railway, Southern Branch) to construct and operate a railroad from Fort Riley, Kansas, or from a point near the Fort Riley reservation, thence down the valley of the Neosho river to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, in Arkansas, every alternate section of public lands designated by odd numbers, to the extent of five alternate sections per mile on each side of said road; but, in case it should appear that the United States had, when the line of railroad was located, &c., other sections within twenty miles might be selected. Said act of Congress further provided that, on the governor certifying to the completion of sections of ten con-
99 secutive miles, patents for lands granted should be issued to the company.

9th. That in pursuance of the acts and agreements and matters hereinbefore set forth, this defendant did, at the time and in the manner prescribed by law, build and construct and have ever since operated and maintained said railroad and telegraph from Emporia via

Council Grove to a point near said Fort Riley, and has also built and constructed and ever since operated and maintained said railroad from said point near Fort Riley to the southern line of the state, and has in every respect fulfilled all the requirements and conditions of the several acts before mentioned; that when each twenty consecutive miles of railroad was completed in the manner required by the various acts of Congress the same was certified to the Secretary of the Interior by the governor of the State of Kansas; that upon the completion of the whole of said line of railroad and telegraph from a point near Fort Riley as aforesaid down the Neosho valley to the south line of the state, the governor of that state did certify that fact to the Secretary of the Interior;
100 thereupon and from other evidence the said Secretary of the Interior became and was satisfied that the whole of said road and telegraph was completed in a good, substantial, and workmanlike manner, as a first-class railroad and telegraph.

This defendant admits that the plaintiff paid and tendered the cost of survey and fees for certifying the lands in controversy and cost of patents for the same as alleged in the petition, and then made application to the register and receiver of the land office at Junction City, Kansas, to select and certify the lands described in the plaintiff's petition, in accordance with the instructions of the Department of the Interior in such cases, and that the said application was refused. Thereupon, upon due notice to this defendant, application was made by said plaintiff to the Commissioner of the General Land Office of the United States for a patent for said lands, upon the grounds and for the reasons stated in said plaintiff's petition; that thereupon and after the introduction of testimony on the part of said plaintiff and defendant, and arguments by
101 counsel and due deliberation thereon, and on the 14th day of April, 1870, the said commissioner decided that said lands belonged to this defendant and not to the said plaintiff; that from said decision said plaintiff appealed to the Secretary of the Interior, who duly considered the same, and did, on the 3d day of October, 1871, decide adverse to the appeal of plaintiff and did approve the decision of said Commissioner of the General Land Office in his award to this defendant; that thereby this defendant became vested with the right and title, in law and in equity, to the lands so granted to the state and applicable to the construction of defendant's road as aforesaid, among which are the lands and the whole thereof described in the plaintiff's petition; that in pursuance of defendant's rights aforesaid the order of the General Land Office of the United States and their approval by the Secretary of the Interior, and the issuance of the patent of this defendant by the State of Kansas, as were severally made and executed, and this defendant therefore avers that the General Land Office of the United States
102 and of the Secretary of the Interior have been in all respects in accordance with law and equity, and that said lands, each

and every parcel thereof, were at the commencement of this action and now are the lands of this defendant, and that the plaintiff has no legal or equitable right or interest therein.

T. C. SEARS,
Defendant's Attorney.

Exhibit "A," mentioned with foregoing petition.

This indenture, made the 19th day of March, A. D. 1866, by and between the Atchison, Topeka and Santa Fe Railway Company, party of the first part, and the Union Pacific Railway Company, Southern Branch, party of the second part, both corporations created and organized under and by virtue of the laws of the State of Kansas, witnesseth: That whereas, by the act of Congress, entitled an act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said state, approved March 3d, 1863, lands were granted
103 to said state in aid of the construction (among other roads and branches) of a railroad from where the line of road of the party of the first part crosses the Neosho river, down said river to where the Leavenworth, Lawrence and Fort Gibson railroad enters said Neosho valley; and *whereas*, by the act of Congress entitled "An act making an additional grant of lands to the State of Kansas to aid in the construction of a railroad and telegraph line from Emporia via Council Grove to a point near Fort Riley on the Branch Union Pacific railroad in said state;" and *whereas* the legislature of the State of Kansas, by its act entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs" in said state, and to apply the same in the construction of said railroads and telegraphs, approved February 9th, 1864, and accept the grant of lands so made by Congress; and whereas the legislature of said state by said act did agree to grant, bargain, and sell to the party of the first part hereunto, in consideration (among other things) that said party of the first part should construct a
104 railroad from a point on the Missouri Pacific railroad, eastern division, at or near Fort Riley, down the Neosho river to a point where the Leavenworth, Lawrence and Fort Gibson railroad enters the said Neosho valley, said road to be constructed as in said act of the legislature and the above-recited acts of Congress especially provided, and did agree, on the completion of sections of said road as therein provided, to convey by patent to the party of the first part hereunto all the lands granted as aforesaid by Congress and applicable to the construction of the road last above mentioned; and whereas the party of the first part did, within six months after the passage of the above-recited act of the legislature of the State of Kansas, file their acceptance of the provisions of the above-recited act, and did thereby covenant and agree with the State of Kansas (among other things) that they would construct the road herein in-

dicated and do and perform all and singular the conditions and requirements in acts of said legislature and of Congress contained; and *whereas* the party of the second part has since that time become a body corporate and politic, created and organized for the
105 purpose of constructing a railroad from a point on the Union Pacific railroad, eastern division, at or near Fort Riley, to the southern boundary of the State of Kansas by way of the Neosho valley, and on the route of road contemplated in said acts of Congress and said legislature; and *whereas* the legislature of the State of Kansas has made to the party of the second part a large appropriation to aid in the construction of the line of road last above mentioned; and *whereas* the great length of the main line of road of the party of the first part must delay the speedy construction of the road in the valley of the Neosho river; and whereas the public good requires that there should be no conflict of rights in the construction of the road in said valley, therefore, for and in consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and in further consideration of the premises, covenants, undertakings, and agreements of the party of the second part, hereinafter contained and set forth, to be by said party kept, per-
106 formed, and observed, the party of the first part hath bargained, sold, and assigned, and by these presents doth bargain, sell, and assign, and transfer and sell and deliver over to the party of the second part, their representatives and assigns, all the rights, title, and interests, franchises, authority, privileges, immunities, and liberties held, acquired, possessed, and enjoyed, for constructing, maintaining, operating, and enjoying a railroad from the Union Pacific railroad, eastern division, from a point at or near Fort Riley down the Neosho valley to where the Leavenworth, Lawrence and Fort Gibson railroad may enter the Neosho valley; which rights, title, interests, franchises, authorities, immunities, and liberties accrued to and became vested in the party of the first part by virtue of its acceptance of the provisions of the act of the legislature of the State of Kansas above recited, and its promise, covenant, undertaking, and agreement to do and perform all and singular the requirements and conditions of said act of said legislature, and of the acts of Congress hereinafter recited and referred to; and in compliance by the party of the second part with the
107 terms, requirements, and conditions of the above-recited acts, the party of the first part authorize and empower the party of the second part to receive, hold, and enjoy any lands, property, or effects applicable to the construction of a railroad between the points aforesaid, as fully and completely as the party of the first part might have held and enjoyed such lands, property, and effects had this assignment or transfer never been made.

In consideration of the premises and the further consideration of one dollar to them in hand paid, the receipt of which is hereby acknowledged, the party of the second part, their representatives and

assigns, covenants and promises with and to the party of the first part, their successors, legal representatives that they will well and faithfully do and perform all and singular the duties, obligations, and requirements imposed upon said party of the first part and assumed and undertaking by said party under the several acts of Congress and of the legislature of the State of Kansas heretofore
108 cited and hereby as more fully setting forth the obligations and liabilities hereby assumed; and that they will construct, maintain, and operate a railroad and telegraph from a point on the Union Pacific railroad, eastern division, at or near Fort Riley down the Neosho river valley to where the Leavenworth, Lawrence and Fort Gibson railroad may enter said valley, within the time required and on the terms and conditions prescribed in said acts; and the party of the second part further agree, covenant, and promise the said party of the first part that they will protect and hold free from harm or loss in property or estate the party of the first part against all forfeitures or penalties occurred or adjudged against said last-named party in consequence of any default or failure made or permitted after the date hereof in the construction, maintenance, or operation of said road or telegraph embraced in this agreement; and the said party of the second part further agree that they will repay any and all moneys necessarily expended up to the date these presents for engineers, surveys, plats, and profiles by the party of the first
109 part upon the above-named line of railroad, on the delivery to them of said engineers' maps, plats, and profiles upon which such expenditures were made.

In testimony whereof the parties hereto have subscribed their names and affixed their seals by order of their respective board of directors.

On behalf of the Atchison, Topeka and Santa Fe Railroad Company—

{ Atchison, Topeka and Santa Fe R. R. Co. Seal. }

SAMUEL C. POMEROY, [L.S.]
President.

WILLIS GAYLORD, [L.S.]
Secretary.

On behalf of the Union Pacific Railroad, Southern Branch—

R. McBRATNEY, [L.S.]
N. S. GOSS, [L.S.]
Agents and Attorneys.

Which said amended answer was endorsed as follows:

110 District court. Kansas Pacific Railway Company *vs.* Missouri, Kansas and Texas Railway Company. Amended answer. Filed 27 January, 1873. M. Mullens, Clerk, by Thomas P. Hookey, deputy. T. C. Sears.

Whereupon the plaintiff filed the following reply:

For reply to the amended answer plaintiffs deny that the same is sufficient to be replied unto, and denies each and every allegation therein contained.

J. P. USHER,
Atty. for Plaintiffs.

Whereupon, to wit, on the 16th day of July, A. D. 1873, this cause coming on to be heard, and the parties appearing by their respective attorneys, the following journal entry was made of the judgment in this case, in the words and figures following, to wit:

111 THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

The parties appearing by their attorneys and by agreement a jury is waived, and by consent this cause is submitted to the court for trial without the intervention of a jury; both parties united in a request to the court to state in writing the conclusions of fact found separately from the conclusions of law, with the view of excepting to the decisions of the court upon the question of law involved in the trial of this cause. And the evidence being heard and considered the court finds as conclusions of fact, from the evidence in the cause, as follows: On the part of the plaintiff, that before the 17th day of July, 1852, the plaintiff, then known by the name of the Leavenworth, Pawnee and Western Railroad Company, had filed in the General Land Office a map showing the general route of
112 its road, pursuant to the 7th section of the act of Congress, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean," and to secure to the government the use of the same for postal, military, and other purposes, approved July 1, 1862. That the general route of said road, as shown upon said map, was west of the town of Lawrence, in said state, from a point on the north bank of the Kansas river opposite said town, thence west along the left bank of said river to the left bank of the Republican fork thereof, thence along said bank of said Republican fork to the 100th meridian of longitude west from Greenwich; that upon the 17th day of July, 1862, the Commissioner of the General Land Office, in compliance with the act of Congress aforesaid, by his communication of that date to the register and receiver of the land office at Junction City, Kansas, notified said officers of the filing of said map, and directed them to withhold from pre-emption, private entry, and sale all the public lands situated in their district and lying within fifteen miles
113 on each side of said route, as designated on the diagram therewith, which communication was received by said officers at Junction City on the 31 day of July, 1862, who on that day carried

out the instruction of the commissioner, and by proper marks on the township plats of lands in their district indicated that the lands along said route and for fifteen (15) miles on each side thereof were reserved from sale or entry of any kind.

Among the lands directed to be reserved from sale by the said commissioner, and which were withdrawn and reserved from sale or entry of any kind, are the following: All the public lands situate in township 13, in ranges 3, 4, 5, 6, 7, and 8 east; all the public lands in the E. ½ of township 12, range 2 E., and in townships 12, ranges 3, 4, 5, 6, 7, and 8 E., the same being situate in said Junction City land district, in which townships a portion of the lands in controversy are situate, as appears by the petition of plaintiff, and the same being within fifteen miles of the road of the plaintiff, as designated on its said map, and the diagram of said commis-
114 sioner. That soon after the passage of the act of Congress, being an act to amend an act entitled an act to amend an act entitled an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July 1, 1862, approved July 2, 1864, approved July 3d, 1866, the plaintiff, then known by the name of the Union Pacific Railway Company, Eastern Division, did, in pursuance of said act, designate the general route of their said railroad, and did file a map thereof in the Department of the Interior, which map designated the line of route of the plaintiff's road from Fort Riley, which is situate on the left bank of the Republican and Kansas river, at the confluence of said streams, and to which point plaintiff had then constructed its road, to the western boundary of the State of Kansas, by the way of the Smoky Hill river. That upon the filing of said map, and on the 11 day of July, 1866, the Secretary of the Interior, in compliance with said act of Congress of July 3d,
115 1866, and the requests of the plaintiff, directed to the Commissioner of the General Land Office to cause the public lands to be withdrawn along the line indicated by said map, and the said Commissioner of the General Land Office, on the 14th day of July, 1866, by his communication of that date to the register and receiver of the land office at Junction City, pursuant to the instructions from the Secretary of the Interior directed to said register and receiver, to withhold from sale or location, pre-emption and homestead all the odd sections within the twenty and twenty-five miles limit, as alienated on the diagram accompanying his instructions. The designated line of railroad, as shown upon the map filed by the plaintiff as aforesaid, and on the diagram transmitted to the register and receiver, is across the Republican river, and along the Smoky Hill river, on the north side thereof, running south of and passing near Junction City, which place is distant three miles from the left bank of the Republican, where this last-named route commenced, and which point of commencement was only a few rods from the

116 mouth of the Republican river. That the instructions of the Commissioner of the General Land Office aforesaid were received by the register and receiver at Junction City on the 26th July, 1866, which said officers, pursuant to said instructions, then provided to mark, and did mark, their official plats to correspond with the diagram sent them by said commissioner; said local officers did in all things comply with the order of said Commissioner of the General Land Office, which withdrawal from location, pre-emption, and homestead embraced all the lands in controversy in this cause, all being within twenty miles of the line of plaintiff's road as subsequently constructed. That in the autumn of 1865, the plaintiff had made a preliminary survey of the route of its road upon the Smoky Hill route, and after the filing of the map and withdrawal of the lands as aforesaid, and some time in the month of August, 1866, commenced the permanent location of its road along its last-mentioned route, and soon thereafter commenced the construc-

117 tion of the same. On the 14th of December, 1866, the president of the plaintiff made his affidavit of the completion of twenty (20) additional miles of the railroad of the plaintiff. That said twenty miles began at a point on the line of said road one hundred and thirty (130) miles westwardly from the east line of the State of Kansas, and terminated at a point 150 miles west of said state line, the said being the sixth (6) section of the road commencing five miles east from Fort Riley. That on the 20 of December, 1866, the Secretary of the Interior instructed the commissioner who had been appointed by the President, pursuant to the acts of Congress aforesaid, to examine and report upon the said 6th section, in accordance with the acts of Congress approved July 1, 1862, and July 2, 1864, and the instructions of the Department of the Interior before given to said commissioners, which should govern them in their examination, but that before said commissioner had proceeded to make said examination the plaintiff had constructed five additional miles of its road, and the said commissioners were, on the 10 January, 1867, duly directed to examine and report upon the 25

118 miles of completed road. That said commissioners did inspect and examine said sixth section of plaintiff's road, and did make their report thereon to the Secretary of the Interior, and did report that they had examined 25 miles of plaintiff's road, commencing at the 130th and terminating at the 155th mile station west from the initial point on the state lines dividing the States of Missouri and Kansas, and the said commissioners did report the said 6 section of 25 miles ready for present service, and completed and equipped as a first-class railroad, which report was made on the 17 day of January, 1867, and was filed in the Department of the Interior with the secretary thereof, who, on the 22d of January, 1867, reported the same to the President of the United States and recommended the acceptance of the said report and the issue of the bonds and patents for lands due the company on account of said section,

agreeably to law, and the President of the United States did, on the said 22d day of January, 1867, approve of the said recom-
119 mendation of the Secretary of the Interior, and directed the Secretary of the Treasury and the Secretary of the Interior to carry into effect the recommendations of the latter officer above mentioned, and set out the lands recommended by the secretary to be so patented to the plaintiff and covered by the executive order last aforesaid, among others embraced all the lands described in the petition of the plaintiff in the cause afterwards certified to the State of Kansas. That on the 30 of April, 1867, the plaintiff filed a map in the Department of the Interior, duly certified, showing the definite location of its road from the 130th to the 220th mile post, which extends from Fort Riley to Fort Harker, which map was accepted by the secretary as the definite location of so much of the road of the plaintiff as lies between the points mentioned, to wit, Fort Riley and Harker; and by the Secretary of the Interior in his instructions to the Commissioner of the General Land Office on the 8 May, 1867, it was declared that the map was to become the basis for the
120 adjustment of the land grant to the plaintiff. The commissioner was further instructed by the Secretary of the Interior on the 8th day of May, 1867, that the odd numbered sections within twenty miles on each side of the line of the road, as represented on the map which was transmitted to the commissioner, among which are the lands in controversy, should be withheld on account of the grant, and the even-numbered sections within that distance should be increased in price to the double minimum; that the odd-numbered sections, therefore, withdrawn for 25 miles on each side of the designated route, which might then fall outside of the said 20 miles, and not within the limits of withdrawals for other roads, should be restored to the condition they were in at the date of withdrawal. There had then been constructed by the plaintiff 185 miles of its road, and the same had been accepted by the President, as was declared by the Secretary of the Interior in his communication to the Commissioner of the General Land Office, who was advised by the secretary that the 7th section, commencing at the 155th and
121 terminating at the 185th mile post, was accepted with a *proviso* that before the issue of bonds or patents said plaintiff should pay to the government commissioners thereunto entitled the per diem and mileage which was justly chargeable to and payable by said plaintiff, under the 21 section of the act of Congress approved July 27, 1866. That on the 1st June, 1867, the commissioners appointed by the President to inspect the 8th section of the plaintiff's road, commencing at the 185th mile post and terminating at the 210th mile post west from the initial point on the state line dividing the States of Missouri and Kansas, filed their report in the Department of the Interior, in which they represented the said 8th section of 25 miles was ready for present service, completed and equipped as a first-class railroad on the 7th of June, 1867, the said Secretary of the

Interior submitted their said report to the President of the United States and recommended the acceptance of the same, and the issue to the plaintiff of bonds and of patents for lands due on account of said section, agreeably to the act approved July 1, 1862, en-
122 titled an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, &c., and the acts amendatory thereof. That the President made an endorsement upon the said communication of the secretary, as follows:

EXECUTIVE MANSION, *June 10th*, 1867.

The within recommendations of the acting Secretary of the Interior are approved, and the Secretary of the Treasury and himself are hereby directed to convey the same into effect.

(Signed) ANDREW JOHNSON,
President U. S.

That on the 7th August, 1867, the commissioners appointed by the President for that purpose made their report to the Secretary of the Interior upon the 9th section of 24 miles of the road and telegraph line of the plaintiff, terminating at the 234 mile post from the initial point aforesaid. The secretary, on the 12 of August, 1867, submitted the report to the President and recommended the accept-
ance of the same and the issue to the plaintiff of bonds and
123 of patents for lands due on account of said section, agreeably to the act approved July 1, 1862, entitled an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, &c., and the acts amendatory thereof, upon which recommendation of the secretary the President made the following endorsement:

EXECUTIVE MANSION, *August* 12, 1867.

The within recommendations of the Secretary of the Treasury are approved, and the Secretary of the Treasury and himself are hereby directed to carry the same into effect.

(Signed) ANDREW JOHNSON,
President U. S.

The railroad of the plaintiff was constructed to Denver and opened to the public and the government for use on the 1 of September, 1870, but that part of the line extending from about the 394 mile post to Denver, 638 miles from the initial point, was not accepted by the President until the 19th of October, 1872. The line from Denver to Cheyenne was completed in the summer of 1870
124 by the Denver Pacific Railway Company, and accepted by the President on the 2d day of May, 1872. The lands in controversy, for which this action is brought and described in the petition, are all adjacent to the (6th) sixth section of the line of the plaintiff's railroad and within 20 miles of said completed section, and are embraced within the order of the President accepting said

sixth (6) section, as hereinbefore stated, and ought by said executive order to have been patented to plaintiff, if by the several acts of Congress affecting the plaintiff and the defendant the President had lawful authority to make such order. That the plaintiff, before the bringing of this suit, paid the costs of the surveys of said lands, pursuant to the direction of the Commissioner of the General Land Office, and tendered and offered in payment the fees of the local land officers required by law to be paid for selecting and certifying said lands, and tendered to the Commissioner of the General Land Office the expense and cost of making the patents for the lands ordered to be patented by the President as aforesaid, but
125 these officers, holding under the instructions of the then Secretary of the Interior, and not being the same officer who had recommended the issuing of the patents, that the lands were not granted to the plaintiff, would not receive from the plaintiff their fees for selecting and certifying said lands and the costs for executing patents for the same, and refused to select and certify said lands to the plaintiff and patent the same to the plaintiff. That the plaintiff appealed to the Secretary of the Interior and demanded that he should cause to be prepared patents to the lands in controversy ready to be executed to the plaintiff in pursuance of the order of the President, as hereinbefore stated. That while the application of the plaintiff was pending before the Commissioner of the General Land Office the defendant appeared and contested the claim of the plaintiff, upon which contest, when appealed to the secretary, the said Secretary of the Interior ruled and decided that the plaintiff was not entitled to said lands, as is set out in the exhibit in said plaintiff's petition, but that the State of Kansas was
126 entitled to the same for the use and benefit of the defendant, and directed the same to be certified to the state in manner and form as set out in the petition, and as is therein expressed, which lands were afterwards so certified and conveyed to the defendant as in said petition is set forth. The *manner* of the plaintiff was duly changed to that of the Kansas Pacific Railway Company before the commencement of this suit, and the Kansas Pacific Railway Company is the same corporation formerly known by the name of the Union Pacific Railway Company, eastern divison, before that known as the Leavenworth, Pawnee and Western Railway Company, incorporated by the territorial legislature of Kansas, the charter of which company is found in the laws of said territory of 1855, p. 9–914, being an "Act entitled an act to incorporate the Leavenworth, Pawnee and Western Railroad Company." That on the 19 day of July, 1867, the President of the United States did set aside for plaintiff fractional section one (1) adjoining Junction City,
127 in pursuance to a resolution of Congress entitled "A resolution granting the right of way through military reserve to the Union Pacific Railway Company and its branches," approved

July 26th, 1866. And the court further finds, as conclusions of fact from the evidence in the cause, as follows: On the part of the defendant—

First. That the defendant, the Missouri, Kansas and Texas Railway Company, was incorporated under the laws of the State of Kansas on the 20 day of September, 1865, under the name of the Union Pacific railway, southern branch. That subsequently, on the 31 day of March, 1870, said corporate name was duly changed to the Missouri, Kansas and Texas Railway Company; that said defendant is the company named in the act of Congress of July 26, 1866, and is the same corporation named herein by the party contracting with the Atchison, Topeka and Santa Fe Railroad Company on the 19 day of March, 1866.

Second. That the Atchison, Topeka and Santa Fe Railroad Company was incorporated by the legislature of the Territory
128 of Kansas by virtue of an act entitled an act incorporating the Atchison and Topeka Railroad Company, passed and approved February 11, 1859.

Third. That an act for a grant of land to the State of Kansas in alternate sections to aid in the construction of certain railroad and telegraph lines in said state was passed by the Congress of the United States and duly approved by the President on the 3d day of March, 1863.

Fourth. That the State of Kansas accepted said grant by an act of the legislature entitled an act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain road and telegraphs in said state, and to apply the same to the construction of such roads and telegraphs, and approved by the governor on the 9th day of February, 1864.

Fifth. That said act provided, among other things, as follows, viz: And provided further, that if the Congress of the United States shall, on or before the 4th day of March, 1866, consent that
129 the Neosho valley of the above-named road (meaning the said Atchison & Topeka Railroad Company) may be extended so as to intersect the Union Pacific railroad, eastern division, at or near Fort Riley, and shall make a grant of lands for such extension of like amount with that granted per mile for the construction of the herein above-named principal road, then said Atchison, Topeka and Santa Fe Railroad Company shall proceed to construct such branch to such intersection on the terms and conditions within above prescribed, applicable to the construction of such main road.

Sixth. That the said Atchison, Topeka and Santa Fe Railroad Company filed in the office of the secretary of the State of Kansas, on the 4 day of August, 1864, a copy of the acceptance of the board of directors of said company of the provisions of said last-named act of the legislature duly certified under the seal of the company, as follows, viz:

Hon. W. W. H. LAWRENCE,
Secretary of State for Kansas, Topeka, Kansas.

130 SIR: At a meeting of the board of directors of the Atchison, Topeka and Santa Fe Railroad Company, held at the office of the state treasurer in the city of Topeka on the 16th day of February, 1864, a quorum being present, the following resolutions were adopted in accordance with the provisions of the 1st section of the act of the Kansas legislature, entitled an act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said state, and to apply the same to the construction of such roads and telegraphs, approved February 9, 1864, to wit:

Resolved: That the Atchison, Topeka and Santa Fe Railroad Company hereby accepts the provisions of an act of the legislature of the State of Kansas, entitled an act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said state, and to apply the same to the construction of

131 such roads and telegraphs, approved February 9, 1864.

Now, therefore, I, Samuel C. Pomeroy, president of the Atchison, Topeka and Santa Fe Railroad Company, do hereby certify that the foregoing resolution of acceptance was duly proposed and adopted at the meeting of the board of directors of said Atchison, Topeka and Santa Fe Railroad Company, as specially warranted at the beginning of this instrument.

In testimony whereof, I have hereunto subscribed my name and caused the seal of our said railroad company to be affixed, at the city of New York, on this the 21 day of July, A. D. 1864.

S. C. POMEROY,
President of the Board of Directors Atchison, Topeka and Santa Fe Railroad Company.

Attest:—C. K. HOLLIDAY,
Secretary and Director of the Atchison, Topeka and Santa Fe Railroad Company.

I, W. H. Smallwood, Secretary of State of the State of

132 Kansas, do hereby certify that the above and foregoing is a true and correct copy of the original instrument of writing filed in my office August 4, A. D. 1864.

In testimony whereof, I have hereunto subscribed my name and affixed the great seal of the state.

Done at Topeka, this 22d day of January, A. D. 1873.

[SEAL.] W. H. SMALLWOOD,
Secretary of State.

Seventh. That an act was passed by the Congress of the United States and duly approved by the President on the 1 day of July, 1864, entitled "An act making an additional grant of lands to the

State of Kansas to aid in the construction of railroad and telegraph lines.

Eight. That an agreement was made on the 19th day of March, 1866, between the said Atchison, Topeka and Santa Fe Railroad Company and the Union Pacific railway, southern branch, by the directors and agents thereof, who were duly authorized thereto by the stockholders of said companies respectively, a copy of said
133 agreement is properly set forth in defendant's answer; that on the 26 day of February, 1867, the legislature of the State of Kansas passed the following resolutions touching said agreement, and the same was duly approved by the governor of the said state, as follows, viz:

Resolved: That the transfer and assignment of the Atchison, Topeka and Santa Fe Railroad Company, made and executed on the 19 day of March, A. D. 1866, to the Union Pacific Railway Southern Branch Company, of all the rights, title, interest, authority, privileges, immunities, and liabilities held, acquired, possessed, and enjoyed, for constructing, maintaining, operating, and enjoying a railroad from a point on the Union Pacific railroad, eastern division, at or near Fort Riley, down the Neosho valley to where the Leavenworth, Lawrence and Fort Gibson railway may intersect the Neosho valley, be, and the same is hereby, ratified and confirmed: Provided, the term franchise, as used in the said transfer and assignment, shall not be construed to impair in any way the charter of said Atchison, Topeka and Santa Fe Railroad Company.

134 Ninth. That on the 26th day of July, 1866, the Congress of the United States passed an act entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," which said act was on said day duly approved by the President of the United States; that the defendant herein is the company named in said act for whose benefit said grant was made to the State of Kansas. That the acceptance of the terms, conditions, and impositions of the said act by this defendant was in the words and figures following, viz:

EMPORIA, KANSAS, *Dec.* 6, 1866.

SECRETARY INTERIOR, WASHINGTON, D. C.

SIR: This is to certify that at a legally convened meeting of the directors of the Union Pacific Railway Southern Branch Company, the same being a corporation legally chartered under the laws
135 of the State of Kansas, at Emporia, Lyon county, Kansas, on the 8th day of August, A. D. 1866, the following resolutions were adopted: Resolved, that the terms, conditions, and impositions of a bill granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas, passed

by Congress 24 day of July, 1866, and approved by the President 26 July, 1866, be, and the same are hereby, accepted by the said Union Pacific Railway Southern Branch Company; and, resolved, that a copy of this resolution properly authenticated be forwarded to the Seretary of the Interior.

Given under my hands and the corporate seal of the Union Pacific Railway Southern Branch Company, at Emporia, Lyon county, Kansas, this sixth (6) day of December, 1866.

N. S. GOSS,
Pres. U. P. R. W. S. B. Co.
P. B. MAXSON,
Sec. U. P. R. W. S. B. Co.

That a receipt of said communication to the Secretary of the Interior was acknowledged, as follows:

DEPARTMENT OF INTERIOR,
136 WASHINGTON, D. C., *January* 4, 1867.

SIR: I have to acknowledge the receipt on the 26 ultimo of a certified copy of resolutions of the directors of the Union Pacific Railway Southern Branch Company, accepting the terms, conditions, and impositions of a bill granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas, passed by Congress 24th day of July, A. D. 1866, and approved by the President 26th day of July, 1866.

I am, sir, very respectfully, your obt. servt.,
O. H. BROWNING.

Hon. P. B. MAXSON,
Emporia, Kansas.

Tenth. That between the 5th and 21st days of September, 1866, the said defendant caused its line or route to be surveyed and made upon the ground from Junction City, a point near the Fort Riley reservation, to Council Grove, a distance of thirty-six miles;
137 that said line had been definitely fixed and located from Emporia to Council Grove in December, 1865, by direction of the Atchison, Topeka and Santa Fe Railroad Company; that said location was approved and adopted by the board of directors of said defendant and the map thereof filed in the office of the secretary of the State of Kansas on the 14th day of November, 1866, and filed in the office of the Secretary of the Interior on the 26th day of December, 1866.

Eleventh. That said defendant commenced the construction of said railroad and telegraph on or about the 1st day of March, 1869, at Junction City, a point near the Fort Riley reservation, and completed the first section of ten consecutive miles prior to the 30th day of September, 1869, and the same was on the 30th day of September, 1869, accepted by the governor of Kansas and certified to the Sec-

retary of the Interior by the said governor as having been completed in a good, substantial, and workmanlike manner, and as a first-class railroad; that on the 1 day of November, 1869, ten further consecutive miles was completed and accepted and cer-
138 tified as aforesaid, and so on for each consecutive ten miles until the 6th day of June, 1870, when the said railroad and telegraph was completed to the south line of the State of Kansas, and the same was, on the 9th day of June, 1870, accepted by the governor of the State of Kansas and certified to the Secretary of the Interior as having been completed in a good, substantial, and workmanlike manner as a first-class railroad, and the same was thereupon accepted by the President of the United States.

Twelfth. That on the 25th day of March, 1867, the Secretary of the Interior addressed a letter or order to the Commissioner of the General Land Office, as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March* 20, 1867.

SIR: Under date of the 19th ultimo I sent to you a map of the Union Pacific railway, southern branch, showing the route of said road in Kansas, from Junction City down the Neosho valley to the northern boundary of the Osage lands. A grant of lands was made to the State of Kansas to aid in the construction of this road
139 July 26th, 1866.—(Stat. 1866, page 289.)

By acts of Congress approved March 3d, 1863, and July 1, 1864, grants of lands were made to the said state to aid in the construction of certain other railroads.

By said act of 1863 one of these roads and its branches, the Atchison, Topeka and Santa Fe railway, is from Atchison via Topeka and, as amended by act 1864, Emporia to the western line of the state in the direction of Fort Union and Santa Fe, New Mexico, and the branch from where the main line crosses the Neosho (at Emporia) down the Neosho valley to where the road from Leavenworth and Lawrence enters said valley. The said act of 1864 is for a railroad from Emporia to Junction City. The ground from Emporia southwardly is covered by the grants of 1863 and 1866, and from that point northwardly by the grants of 1864 and 1866.

N. S. Goss, president of the said Union Pacific Railway Company, southern branch, claims on behalf of said company all the grants for the construction of a railroad on any part of said line made to the State of Kansas by the acts of Congress approved March
140 3, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka and Santa Fe Railroad Company, to which they were granted by the state by an act approved February 9, 1864, accepting said grants, as well as the lands granted by the said act of July 26, 1866. A certified copy of that assignment, also a certified copy of resolutions No. 6 of the legisla-

ture of Kansas, approved February 26, 1867, ratifying the same, have been filed by Mr. Goss. The grant to the State of Kansas by the said acts of 1863 and 1864 is the alternate odd-numbered sections for ten sections in width on each side of the roads and branches, with the right of indemnity for lands disposed of from odd sections outside of ten and within twenty miles of the same, provided that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except where it is found necessary to locate the route through such reserved lands. In that case the right of way is granted,
141 subject to the approval of the President of the United States.

The lands thus granted are subject to the disposal of the legislature for the purpose of aiding in the construction of the railroads exclusively, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act *provided*, which is: That the state may sell 120 sections before any road is built, and thereafter 120 sections upon the completion of every twenty miles, provided that if any part of said road and branches is not completed within ten years from the passage of this act, no further sale shall be made and the lands unsold shall revert to the United States. The grant to Kansas by said act of July 26, 1866, is for alternate odd-numbered sections to the extent of five alternate sections per mile on each side of said road, not exceeding in all ten sections per mile, with the right of indemnity outside of ten and within twenty miles from both the odd and even sections, provided that any and all lands reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of *internal improve-*
142 *ment* or other purpose whatever, are reserved and excepted from the act, except the right of way, 200 feet in width, through such reserved lands, subject to approval of the President of the United States.

This grant of lands is declared to be made upon the condition that said company after its construction shall keep it in repair and shall at all times transport United States troops, supplies, and public stores free from all cost or charge therefor to the government, and the granted lands are to inure to the benefit of said company upon the governor of Kansas certifying to the completion of any section of ten consecutive miles of road, the lands within the limits of such completed section and coterminous with the same are to be patented to the company upon said company filing with the Secretary of the Interior a map of its lands designating the route thereof. It is made his duty to withdraw from market the lands granted in such manner as to effect the purposes of the act and subserve the

public interest. The right of way through the public lands is granted to said company, its successors and assigns, to the
143 extent of 200 feet, where the same may pass through the public domain, also all necessary granted for station-houses, work-shops, etc., with the right to take from the public lands adjacent to the line of said road material for the construction thereof. The acceptance by said company of the terms and conditions of the grant duly executed has been filed.

The said railroad company is also authorized to extend and construct its railroad from the southern boundary of Kansas through the Indian Territory upon certain conditions.

The State of Kansas will, upon complying with the terms, conditions, and stipulations of said act of March 3d, 1863, and July 1, 1864, become entitled to the lands granted by said acts. To enable the state to do so the lands may be withdrawn for the necessary instructions to the land officers in Kansas if such instructions have not already been issued. In virtue of said assignment and the ratification thereof by the legislature of the State of Kansas, the lands inuring to the state under said grants of 1863 and 1864 will be adjusted to the state for the benefit of said Union Pacific Rail-
144 way Southern Branch Company, upon the principles heretofore established and now in force, and then if any lands remain to the United States of odd sections within the limits of twenty miles on each side of the railroad between the termini mentioned, the said Union Pacific railway, southern branch, will become entitled to patents for such odd sections and also of such even sections as remain to the United States outside of the ten and within the twenty miles of the road, upon complying with all the terms, conditions, and stipulations of said act of July 26, 1866.

If the even sections of land remaining to the United States outside of the ten and within the twenty miles have not been withdrawn, you will issue the necessary instructions to the land officers in Kansas withdrawing the same.

The map of definite location of the route of said railroad now on file in your office will become the basis of adjustment of the grants under the said acts. The certified copies of assignment and acts of the legislature referred to are herewith to be placed on the files of your office. You will send a copy of this letter to the governor of Kansas.

145 Very respectfully, your obt. servt.,

O. H. BROWNING, *Secretary.*

Hon. *James* S. WILSON,
Commissioner of the General Land Office.

Which said copy of letter was received by the Governor of Kansas on the 30th day of March, 1867. And thereupon the Commissioner of the General Land Office, on the 26th day of March, 1867, ordered the register and receiver of the land office of the Junction City district to make a withdrawal, as follows, viz:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 26, 1867.

REGISTER AND RECEIVER, JUNCTION CITY, KANSAS.

GENTLEMEN: Under acts of Congress approved July 26th, 1866, Pamphlet Laws 1866, p. 289, there is granted to Kansas to aid in the construction of a railroad by the Union Pacific Railroad Company, Southern Branch, from Fort Riley, Kansas, "or near
146 said military reservation, thence down the valley of the Neosho river to the southern line of the state, every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile, and where any of said sections have been reserved, sold, pre-empted, or otherwise disposed of by the United States, there is to be reserved" for the purposes aforesaid from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, &c., provided that said lands hereby granted shall not be selected beyond twenty miles from the line of railroad. The second section of the act increases the price of the even sections within *ten miles* on each side of said road to double the minimum price, provided that actual bona fide settlers under the pre-emption laws may, upon due proof, &c., purchase the same
147 at the price fixed for said lands at the date of settlement, and provided that homestead settlers may take 80 acres each of such double minimum lands.

The fourth section requires that the lands granted shall be withdrawn as soon as the company shall file a map of its line of route. The company having duly filed a line of route in this office through the Secretary of the Interior, I inclose a diagram of that part coming within the limits of your district, with the ten and twenty mile limits on each side of the road laid down thereon. You will, upon its receipt, proceed to mark on your plats the limits as therein designated, and will reserve from sale, location, or entry of any kind, except in case of bona fide pre-emptions initiated prior to the withdrawal, all the odd-numbered sections within the ten mile limits and all the vacant lands between the ten and twenty mile limits. The even sections within the ten mile or granted limits you will withdraw from private entry, and the same will only be subject to
148 pre-emption and homestead entry at the rate of $\$2\frac{50}{100}$ per acre, until regularly offered at public sale, except in cases of bona fide pre-emption, where settlement was made prior to this withdrawal, wherein the party may make proof and pay for the same at $1.25 per acre. Be pleased to acknowledge the date of receipt of this, from which time the same became effective.

Very respectfully,
JOS. S. WILSON, *Commissioner.*

"F. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *Nov. 2d*, 1872.

I, W. W. Curtis, acting Commissioner of the General Land Office, do hereby certify that the annexed copy is a true and literal exemplification of the original, recorded in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] W. W. CURTIS,
Acting Commissioner of General Land Office.

149 That said order was received by said register and receiver on the 1st day of April, 1867, and they did mark on their plats the limits as designated on said diagram and reserved from sale, location, or entry the lands within said limits, in which are included all the lands described in plaintiff's petition; said diagram is hereto attached and made a part of this finding.

Thirteenth. That after the application of said plaintiff to the register and receiver of the Junction City land office to select and certify the lists of the lands in controversy to said plaintiff, and the refusal of said officers so to select and certify, the said plaintiff made application to the Commissioner of the General Land Office to have said lands selected and certified, and to issue patents to plaintiff therefor.

That this defendant thereupon appeared and asserted its claim to said lands. That issue was joined thereon, testimony taken, and argument had, and that said land commissioner, on the 14th
150 day of April, 1870, decided the same adversly to the plaintiff and in favor of the defendant.

That on the 22d day of April, 1870, the said plaintiff appealed from the decision of said commissioner to the Secretary of the Interior, as follows:

WASHINGTON, D. C., *April 22d*, 1870.

Hon. JOS. *C.* WILSON,
Commr. of the General Land Office.

SIR: Acknowledging the receipt of your letter of the 21 inst., enclosing a copy of your decision dated the 14th inst., adverse to the right of the Kansas Pacific R. R. Company to select and receive patents for certain odd-numbered tracts of land within twenty miles of its road in the Junction City land district, Kansas, as attorneys for said company we hereby respectfully appeal from your said decision to the Hon. Secretary of the Interior, and propose to file within a few days or weeks our points of exception to the same.

Very respectfully, etc., etc.,
J. P. USHER,
HENRY BEARD,
Attorneys.

151 That the contest was thereupon heard and argued before the Secretary of the Interior, who, after due consideration, and on the 3d day of October, 1871, affirmed the decision of said commissioner and awarded said lands to the State of Kansas for the benefit of the defendant.

Fourteenth. That on the 1st day of July, 1865, the said plaintiff filed a map approved by the directors of said company in the office of the Secretary of the Interior, designating the general route of its road west of Fort Riley, up the Republican river.

Fifteenth. That on or before the 1st day of January, 1873, the Governor of the State of Kansas certified to the Secretary of the Interior that the said Atchison, Topeka and Santa Fe Railroad Company had completed the railroad and telegraph from its initial point to the west line of the State of Kansas, together with the branches, as a first-class railroad and telegraph, and the same was thereupon accepted by the Secretary of the Interior; said certificate of the governor, as follows, viz:

152 EXECUTIVE OFFICE, STATE OF KANSAS,
TOPEKA, *January* 1, 1873.

I, James M. Harvey, Governor of the State of Kansas, do hereby certify that this plat or map of the Atchison, Topeka and Santa Fe railroad and branch has been duly filed in my office by the said railroad company, and shows the said railroad, to wit: A railroad from the city of Atchison via Topeka, the capital of said state, to the western line of the state, in the general direction of Fort Union and Santa Fe, New Mexico, commencing at the city of Atchison and ending at the west line of the state, a distance of four hundred and sixty-nine miles and $\frac{35}{100}$ (469.35) consecutive miles, with the whole of a branch from where the said Atchison, Topeka and Santa Fe railroad crosses the Neosho, down said Neosho valley to the point where the Leavenworth, Lawrence and Galveston railroad enters the Neosho valley, and to the point of intersection of the last-named railroad and the said branch, the whole of which railroad and branch and telegraph have been completed and
153 equipped in a good, substantial, and workmanlike manner as first-class railroads and telegraphs, as required by the act of Congress approved March 3, 1863, entitled "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said state, and the act of the legislative assembly of the State of Kansas, approved February 9, 1864, entitled "An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said state, and to apply the same to the construction of such roads and telegraphs," and a resolution of said legislative assembly ratifying the transfer of certain railroad lands, approved February 26, 1867, granting lands to the said railroad company; and I further certify

157 List of lands included in the 15 mile limit of the withdrawal of July 31, 1862.

Parts of section.	Sec.	Town.	Range.	No. of acres.	
N. E. ¼	1	13	4	160	
E. ½ of N. W. ¼	1	"	"	80	
S. W. ¼ & S. E. ¼	1	"	"	320	
W. E. ¼	11	"	"	160	
E. ½ of N. W. ¼	"	"	"	80	
S. W. ¼ & S. E. ¼	"	"	"	320	
N. E. ¼ & N. W. ¼	13	"	"	320	
S. W. ¼ & S. E. ¼	"	"	"	320	
N. E. ¼ & N. W ¼	15	"	"	320	
S. W. ¼ & S. E. ¼	"	"	"	320	
N. E. ¼ & N. W. ¼	23	"	"	320	
S. W. ¼ & S. E. ¼	"	"	"	320	
N. E. ¼ & N. W. ¼	25	"	"	320	
S. W. ¼ & S. E. ¼	"	"	"	320	
N. E. ¼ & N. W. ¼	1	13	5	320	20
S. W. ¼ & S. E. ¼	"	"	"	320	
N. W. ¼	3	"	"	164	41
E. ½ of S. E. ¼	"	"	"	80	
N. E. ¼ & N. W. ¼	5	"	"	328	34
S. W. ¼ & S. E. ¼	"	"	"	320	
N. E. ¼ & N. W. ¼	7	"	"	308	09
S. W. ¼ & S. E. ¼	"	"	"	308	27
N. ½ of N. E. ¼	9	"	"	80	
N. ½ of N. W. ¼	"	"	"	80	
S. W. ½ of N. W. ¼	"	"	"	40	
E. ½ of N. E. ¼	11	"	"	80	
158 W. ½ of N. W. ¼	"	"	"	80	
S. E. ¼ of N. W. ¼	"	"	"	40	
S. W. ¼	"	"	"	160	
E. ½ of S. E. ¼	"	"	"	80	
S. W. ½ of S. E. ¼	"	"	"	40	
N. E. ¼ & N. W. ¼	13	"	"	320	
S. W. ¼ & S. E. ¼	13	13	5	320	
N. E. ¼ & N. W. ¼	15	"	"	320	
S. W. ¼ & S. E. ¼	"	"	"	320	
N. ½ of N. E. ¼	17	"	"	80	
N. ½ of N. W. ¼	"	"	"	80	
S. ½ of S. E. ¼	"	"	"	80	
S. W. ¼ of N. E. ¼	19	"	"	40	
N. W. ¼ & S. W. ¼	"	"	"	298	68
N. W. ¼ of S. E. ¼	"	"	"	40	
S. ½ of N. E. ¼	21	"	"	80	
N. W. ¼ & S. W. ¼	"	"	"	320	
S. E. ¼	"	"	"	160	

N. E. ¼ & N. W. ¼	23	"	"	320		
S. W. ¼ & S. E. ¼	"	"	"	320		
N. E. ¼ & N. W. ¼	25	"	"	320		
S. W. ¼ & S. E. ¼	"	"	"	320		
N. E. ¼ & N. W. ¼	27	"	"	320		
S. W. ¼ & S. E. ¼	"	"	"	320		
N. E. ¼	29	"	"	160		
E. ½ of N. W. ¼	"	"	"	80		
E. ½ of S. W. ¼	"	"	"	80		
159 S. E. ¼	"	"	"	160		
W. ½ of N. E. ¼	31	"	"	80		
N. W. ¼	"	"	"	151	11	
S. E. ¼ of S. E. ¼	"	"	"	40		
N. E. ¼ & N. W. ¼	33	"	"	320		
S. W. ¼ & S. E. ¼	"	"	"	320		
N. E. ¼ & N. W. ¼	35	"	"	320		
S. W. ¼ & S. E. ¼	"	"	"	320		
E. ½ of N. E. ¼	25	12	"	80		
W. ½ of N. W. ¼	"	"	"	80		
S. W. ¼ & S. E. ¼	"	"	"	320		
Lot No. 5	27	"	"	5		
W. ½ of S. E. ¼	29	"	"	80		
Lots Nos. 9, 8, 10, 11, 12, 13, and 14	31	"	"	289	90	
W. ½ of N. W. ¼	35	12	5	80		
N. ½ of S. W. ¼	"	"	"	80		
S. E. ¼ of S. E. ¼	"	"	"	40		
S. W. ¼ of S. E. ¼	7	12	6	40		
E. ½ of S. E. ¼	"	"	"	80		
N. E. ¼ & N. W. ¼	9	"	"	320		
S. W. ¼ & S. E. ¼	"	"	"	320		
N. E. ¼ & N. W. ¼	15	"	"	320		
S. W. ¼	"	"	"	160		
N. W. ¼ of S. E. ¼	"	"	"	40		
S. ½ of N. E. ¼	17	"	"	80		
S. E. ¼ of N. W. ¼	"	"	"	40		
N. E. ¼ of S. W. ¼	"	"	"	40		
160 S. E. ¼	"	"	"	160		
N. E. ¼	19	"	"	160		
E. ½ of N. W. ¼	"	"	"	80		
S. W. ¼ of N. W. ¼	"	"	"	40		
S. W. ¼ & S. E. ¼	"	"	"	310	64	
N. E. ¼ & N. W. ¼	21	12	6	320		
S. W. ¼ & S. E. ¼	"	"	"	320		
N. W. ¼ of N. W. ¼	27	"	"	40		
N. E. ¼	29	"	"	160		
N. W. ¼ & S. W. ¼	"	"	"	320		
S. E. ¼	"	"	"	160		
N. E. ¼ & N. W. ¼	33	"	"	320		

S. W. ¼ & S. E. ¼		"	"	"	320	
N. E. ¼ & N. W. ¼	35	"	"	"	320	
S. W. ¼ & S. E. ¼		"	"	"	320	
S. W. ¼ of N. E. ¼	3	13	6		40	
E. ½ of S. W. ¼		"	"	"	80	
S. E. ¼		"	"	"	160	
N. E. ¼ & N. W. ¼	5	"	"	"	322	29
S. W. ¼ & S. E. ¼		"	"	"	320	
N. E. ¼ & N. W. ¼	7	"	"	"	313	84
S. W. ¼ & S. E. ¼		"	"	"	313	52
S. ½ of N. W. ¼	9	13	6		80	
S. W. ¼		"	"	"	160	
W. ½ of N. E ¼	11	"	"	"	80	
E. ½ of N. W. ¼		"	"	"	80	
E. ½ of S. W. ¼		"	"	"	80	
161 S. E. ¼		"	"	"	160	
N. E. ¼ of N. E. ¼	13	"	"	"	40	
N. W. ¼ of N. W. ¼		"	"	"	40	
S. ½ of N. W. ¼		"	"	"	80	
S. W. ¼		"	"	"	160	
N. E. ¼ & N. W. ¼	15	"	"	"	320	
S. W. ¼ & S. E. ¼		"	"	"	320	
N. E. ¼ & N. W. ¼	17	13	6		320	
S. W. ¼ & S. E. ¼		"	"	"	320	
N. E. ¼ & N. W. ¼	19	"	"	"	294	75
S. W. ¼ & S. E. ¼		"	"	"	314	97
N. E. ¼ of N. E. ¼	21	"	"	"	40	
S. ½ of N. E. ¼		"	"	"	80	
S. E. ¼		"	"	"	160	
N. E. ¼	23	"	"	"	160	
W. ½ of N. W. ¼		"	"	"	80	
W. ½ of S. W. ¼		"	"	"	80	
S. E. ¼		"	"	"	160	
N. E. ¼ & N. W. ¼	25	"	"	"	320	
S. W. ¼ & S. E. ¼		"	"	"	320	
N. E. ¼ & N. W. ¼	27	"	"	"	320	
S. W. ¼ & S. E. ¼		"	"	"	320	
N. W. ¼ & S. W. ¼	29	"	"	"	320	
N. E. ¼ & N. W. ¼	31	"	"	"	313	49
S. W. ¼ & S. E. ¼		"	"	"	312	43
N. E. ¼ & N. W. ¼	33	"	"	"	320	
S. W. ¼ & S. E. ¼		"	"	"	320	
162 N. E. ¼ & N. W. ¼	35	"	"	"	320	
S. W. ¼ & S. E. ¼		"	"	"	320	
N. E. ¼ & N. W. ¼	1	14	6		322	
S. W. ¼ & S. E. ¼	1	14	6		320	
N. E. ¼ & N. W. ¼	3	"	"	"	228	64
S. W. ¼		"	"	"	160	

W. ½ of S. E. ¼	"	"	"	80	
E. ½ of N. E. ¼	5	"	"	80	84
S. E. ¼ of S. W. ¼	"	"	"	40	
N. E. ¼ of S. E. ¼	"	"	"	40	
Total				28,704	41

163 That the plaintiff complied with and performed all the conditions of the several acts of Congress aforesaid, so as to entitle the plaintiff to a patent for said lands, and that the Secretary of the Interior wrongfully refused to cause to be executed to the plaintiff a patent for said lands, and it is ordered and decreed that the defendant do execute to the plaintiff within twenty days herefrom a deed in due form of law for said lands above described, vesting the title to said lands in the plaintiff, in default whereof that this decree do stand for and shall be taken and held in all places as a full and complete conveyance and investiture of the title of said lands above described in the plaintiff.

To all which rulings and decisions of the court the defendant at the time the same were pronounced duly excepted.

And as to all the other and residue of said lands in the petition mentioned and described, the court finds as conclusions of law from and upon the facts so found as aforesaid, that the same were
164 embraced in grants by Congress under and by virtue of the act entitled "An act making an additional grant of lands to the State of Kansas to aid in the construction of railroads and telegraph lines," approved July 1, 1864, and the act entitled "An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," approved July 26, 1866.

That the defendant having in all things complied with the provisions and conditions of said acts and each of them, became and was entitled to procure patents for said lands, and was so entitled at the time the same were certified to the State of Kansas by the Commissioner of the General Land Office of the United States, and has been and now is the legal and equitable owner of said lands, and that said plaintiff has no interest whatever therein; and as to the said last-mentioned lands it is ordered and decreed that said petition be dismissed; to all which decisions and rulings of the court
165 adverse to the plaintiff the plaintiff at the time the same were made duly excepted. It is further ordered that the costs in said action, taxed at $64.32, be adjudged to said plaintiff and defendant share and share alike, to which order the plaintiff excepted.

(Signed) W. H. CAUFIELD, *Judge.*

STATE OF KANSAS, }
COUNTY OF DAVIS. }

I, Martin Mullens, clerk of the district court in and for the county and state aforesaid, hereby certify that the above and foregoing is

a true and correct copy of the papers and proceedings in the above-mentioned cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of court, this 20th day of August, A. D. 1873.

[SEAL.] MARTIN MULLENS, *Clerk.*

Which petition in error and transcript was endorsed on the back as follows, to wit:

166 No. 249. Kansas Pacific Railway Company vs. Missouri, Kansas and Texas Railway Company. Petition in Error and Transcript. Filed December 24, 1873. A. Hammatt, Clerk Supreme Court.

Be it remembered that at the July term, A. D. 1874, of the said Supreme Court State of Kansas, holden at the city of Topeka in said state, commencing on the 29th day of October, 1875, there were present Hon. S. A. Kingman, Chief Justice, Hon. D. M. Valentine and Hon. D. J. Brewer, Associate Justices, and A. Hammatt, Clerk.

167 And thereafter, to wit, upon the 29th day of October, 1874, the following proceedings were had in said cause, as appears by the records of said court and upon Journal "D," page 441, to wit:

Journal "D," page 441.

KANSAS PACIFIC RAILWAY COMPANY
vs.
MISSOURI, KANSAS & TEXAS RAILWAY CO.

This cause came on to be heard on petition in error and transcript of the record of the District Court of Davis County, and was submitted on briefs of counsel, J. P. Usher, esq., for plaintiff in error, and T. C. Sears, esq., for defendant in error, and taken under advisement by the court.

And be it further remembered, that thereafter and at the special August term of said court and upon the 24th day of August,
168 1875, the following proceedings were had in said cause in said court, and in Journal "E," page 142, to wit:

Journal "E," page 142.

THE KANSAS PACIFIC RAILWAY COMPANY
vs.
THE MISSOURI, KANSAS & TEXAS RAILWAY CO.

This cause came on for decision. And thereupon it is ordered and adjudged that the judgment of the court below be *reversed*, with costs, and the case remanded with instructions as to the lands in con-

troversy to enter judgment for the plaintiff, as prayed for in its petition.

Brewer, *J.*, delivered the opinion of the court. All the justices concurring.

And thereupon the opinion of said court, above mentioned, was delivered, in words and figures as follows, to wit:

169 STATE OF KANSAS, }
SUPREME COURT. }

THE KANSAS PACIFIC RAILWAY COMPANY }
vs. } Reversed.
THE MO., K. & T. RAILWAY CO. }

Syllabus. By the court. Brewer, *J.*

1. On the 26th of July, 1866, the lands adjacent to the then selected line of plaintiff's road up the Smoky Hill river, and including the lands in controversy, were, in pursuance of positive and direct legislation, reserved from sale by the U. S., and on the 22d of January, 1867, the road along these lands was completed, accepted by the President, and patents by him ordered to be issued for said lands. The land grants to the defendant provided that in case it should appear when the line or route of its road was definitely fixed that the U. S. had sold any section, or that it had been reserved by the U. S. for any purpose whatever, then the Secretary of the
170 Interior should cause other lands in equal amount to be selected for the grant. The line of defendant's road adjacent to the lands in dispute was definitely fixed between the 5th and 20th of September, 1866. Held, that the grant to the defendant never attached to the said lands, but that full title thereto passed to the plaintiff by the construction and acceptance of its road.

All the justices concurring.

Opinion. By the court. Brewer, *J.*

This is a controversy between these two corporations as to the title to certain lands situate near the junction of their roads and claimed by each respectively under a congressional land grant. The suit was brought by the plaintiff in error in the District Court of Davis County, and embraced nearly one hundred thousand acres of land in the counties of Davis and Dickinson. As to the major portion of these lands the district court decided in favor of the defendant, and the plaintiff now brings the case here on error.
171 Each Co. claim under a land grant. In neither is it pretended that there was any specific designation of the lands granted. In each the location of the road determined the specific tracts. It becomes necessary, therefore, as to each road, to examine the terms of the grant as well as to ascertain when the line of the road was definitely fixed.

The plaintiff, originally known as the Leavenworth, Pawnee and Western Railroad Company, subsequently as the U. P. R. W. Co., eastern division, and finally by its present name, claims under the acts of Congress in aid of the construction of a road from the Mo. river to the Pacific ocean. The first of these acts was approved July 1, 1862, and while it contemplated but a single main line it also provided for the construction of two or three branches on the eastern end. One of these branches was to be constructed by the plaintiff. Sect. 3 defines the land grant to the main company. It reads, "that there be and is hereby granted to the said company * * * * every alternate section of public land designated by
172 odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the U. S., and to which a pre-emption or homestead claim may not have been attached at the time the line of said road is definitely fixed. Sec. 4 provided that commissioners should be appointed upon the completion of every forty miles of road, to examine and report whether such completed portion was built as required by the act, and upon a favorable report patents were to issue for the adjacent lands. In sect. 6 the grants were declared to be upon condition that the bonds issued by the U. S. in aid of the construction should be paid at maturity; that the road should be kept in repair, and the mails, troops, &c., transported thereon. In section 7 the assent of the Co. to the act was required within one year, and the completion of the road by July 1, 1874, and then follows these provisions: "*Provided*, That within two years after the passage of this act said company shall
173 designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale, and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purpose herein named; *Provided*, That in fixing the point of connection of the main trunk with the eastern connections it shall be fixed at the most practicable point for the construction of the Missouri and Iowa branches, as hereinafter provided." By section 8 the President was authorized to designate the initial point of the main line, which was to be on the 100th meridian west from Greenwich, and at which all the eastern branches were to unite. Sects. 9 and 10 refer to the plaintiff's road, and are as follows: Sec. 9. *And be it further enacted*, That the Leavenworth, Pawnee and Western Railroad Com-
174 pany of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with

the Pacific railroad of Missouri, to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri river to the Rocky mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas river as aforesaid and the aforesaid point on the one hundredth meridian
175 of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection with the limits prescribed in the act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas west of the meridian of Fort Riley, to the aforesaid point on the one hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point on the one hundredth meridian of longitude west from Greenwich, in the Territory of Nebraska. Sec. 10. *And be it further enacted*, That the said company, chartered by the State of Kansas, shall complete one hundred miles of their said road, commencing at the mouth of the Kansas river as aforesaid, within two years after filing their assent to the conditions of this act as herein provided, and one hundred miles per year thereafter until the whole is completed. Under this act the plaintiff, as appears
176 by the findings, filed a map of its general route, and the fifteen mile strip on either side thereof was duly reserved from sale. This route extended up the Kansas river to the left bank of the Republican, and thence along the bank of said last-named river to the 100th meridian. Subsequently, and on the 2d of July, 1864, Congress passed an amending act, which increased the land grant the area of reserved lands, and authorized the plaintiff to connect its road with the main line at other than the 100th meridian, providing, however, that the grant of bonds or lands should not thereby be increased. Again, on the 3d of July, 1866, Congress passed an act as follows, authorizing the location of a new route, the filing of a map thereof, and the reservation of the adjacent lands:

III.

"An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, &c., &c., approved July 2d, 1864, approved

July 3d, 1866. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Union Pacific Railway Company, eastern division, is hereby authorized to designate the general route of their said road and to file a map thereof, as now required by law, at any time before the first day of December, eighteen hundred and sixty-six; and upon the filing of the said map showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior: *Provided*, That said company shall be entitled to only the same amount of the bonds of the United States to aid in the construction of their line of railroad and telegraph as they would have been entitled to if they had connected their said line with the Union Pacific railroad on the one hundredth degree of longitude, as now required by law: *And provided further*, That said company shall connect their line of railroad and telegraph with the Union Pacific railroad, but not at a point more than fifty miles westwardly from the meridian of Denver, in Colorado.

In pursuance of this act, and on the 11th of July, 1866, the plaintiff filed a map of its newly-selected route up the Smoky Hill instead of the Republican river, and on the 26th of July, 1866, the lands along the lines thereof were all duly reserved from sale by order of the Secretary of the Interior. This reservation included all the lands in controversy. Prior thereto, the road had been completed to Fort Riley, and soon thereafter work commenced on the extension up the Smoky Hill.

On the 14th of December, 1866, the president of the Co. made his affidavit of the completion of twenty miles, and on the 20th of same month, the commissioners appointed by the President were directed to make their examination. Before making their examination, the Co. had completed five additional miles, and on the 10th of January, 1867, the commissioners were directed to examine and report upon the twenty-five miles of completed road. The commissioners, on the 17th of January, 1867, reported favorably, and on the 22d of January, 1867, the President of the United States approved the same and directed the issue of patents for lands due the Co. on account of this completed section of twenty-five miles.

All the lands in controversy were covered by this executive order. These are all the facts material to the plaintiff's title. From them, it seems that two proposition are clearly deducible: First, the lands in controversy were, among others, on the 26th of July, 1866, duly and legally reserved from sale; and, Second, that as between the U. S. and the plaintiff, full title to these lands passed at least upon the approval by the President of the report of the commissioners and the order to issue patents. It is probable that title passed upon

the permanent location of plaintiff's road adjacent to these lands, but as the time of such location is not definitely shown by the findings, and as a vesting of title prior to the approval of the President would not, in the conclusion to which we have come, have
180 any effect upon the decision, we forbear further inquiry in that direction. So far as the action of the President was required, the subsequent approval was equivalent to a prior selection of the route. Turning now to the claim of defendant, let us see upon what it rests. The first act in its claim of title was approved March 3d, 1863, so much as is material, is as follows:

"An act for the grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said state. Approved March 3d, 1863.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be and is hereby granted to the State of Kansas for the purpose of aiding in the construction, * * * * * * * second, of a railroad from the city of Atchison via Topeka, the capital of said state, to the western line of the state, in the direction of Fort Union and Santa Fe, New Mexico, with a branch from where this last-named road crosses the Neosho, down said Neosho valley to the point where the first-
181 named road enters the said Neosho valley, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads and each of its branches. But in case it should appear that the United States have, when the lines on routes of said road and branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlement have attached as aforesaid; which lands thus indicated by odd numbers and selected by
182 directions of the Secretary of the Interior as aforesaid shall be held by the State of Kansas for the use and purpose aforesaip: *Provided*, That the lands to be so selected shall in no case be located further than twenty miles from the lines of said road and branches: *Provided further*, That the lands hereby granted for and on account of said roads and branches severally shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same and in this act hereinafter provided: Provided, also, That no part of the land granted in this act shall be applied to aid in the construction of any railroad or part thereof for the con-

struction of which any previous grant of land or bonds may have been made by Congress: And provided further, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or
183 for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so for as it may be found necessary to locate the routes of said road and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States. In this act was no grant affecting in any way the lands in controversy, but the legislature of the State of Kansas in accepting, on the 9th of February, 1864, this grant and transferring certain of the lands to the A., T. & S. F. R. R. Co. added this proviso: "*Provided further*, That if the Congress of the United States shall, on or before the 4th day of March, 1866, consent that the Neosho valley branch of the above-named road may be extended so as to intersect the Union Pacific railroad, eastern division, at or near Fort Riley, and shall make a grant of lands for such extension of like amount with that granted per mile for the construction of the herein above named principal road,
184 then said Atchison, Topeka and Santa Fe Railroad Company shall proceed to construct such branch to such intersection on the terms and conditions hereinbefore prescribed applicable to the construction of such main road. In pursuance of this implied request Congress, on the 1st of July, 1864, passed an act making a land grant to the State of Kansas to aid in the construction of the road indicated in the above proviso, which grant was made expressly "subject to all the provisions, restrictions, limitations, and conditions in regard to selection and location of lands and otherwise" of the act of March 3, 1863, heretofore noticed.

Subsequently, with the assent of the state, the A., T. & S. F. R. R. Co. transferred to the defendant all its interest in the grant, and on the 26th of July, 1866, Congress passed a new act granting lands, of which the title and the first section is as follows:

"An act granting lands to the State of Kansas to aid in the construction of southern branch of the Union Pacific railway
185 and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho river to the southern line of the State of Kansas, with a view of an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas for the use and benefit of said railroad company

every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten alternate sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or
186 any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public land of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands thus indicated by the direction of the Secretary of the Interior shall be reserved and held for the State of Kansas for the use of said company by the said secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by an act of Congress, or in any other manner by competent authority, for the purpose of aid-
187 ing in any object of internal improvement or other purpose whatever, be and the same are hereby reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

The U. P. R. R. Co., southern branch, is the defendant here, the name having been subsequently changed to that of the M. K. & T. R. W. Co. Between the 5th and 20th of September, 1866, the defendant caused its line to be surveyed and made on the ground adjacent to the lands in controversy, which survey and location was approved by the board of directors of the defendant, and a map thereof filed in the office of the secretary of state of Kansas on Nov. 14th, 1866, and in the office of the Secretary of the Interior, December 26th, 1866. On the 9th day of June, 1870, the defend-
188 ant's road was completed to the south line of the state, accepted by the governor, and by him certified to the Secretary of the Interior as a first-class railroad, and thereupon accepted by the President. This constitutes the defendant's claim of title. Looking merely to the granting clause in these acts, under which defendant claims, and the words used are words of present grant, "that there be and is hereby granted." Now, if there were any designation of specific tracts, or any reference to existing lines, whether natural or artificial, from which by mere survey and measurement the specific tracts could be ascertained, it might well be

said that the title to those tracts passed immediately, subject to be defeated by a failure to perform the conditions of the grant. Perhaps, too, if there were no other limitation than the want of a definitely located line of road, the location of the road would make the grant operative from the day of its date, and thus cut off all intervening claim. But other limitations appear in both the acts of March 3d, 1863, and July 26, 1866. It is provided that in
189 case it shall appear that the U. S. have, when the line or routes of said road and branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or the right of preemption or homestead settlement has attached to the same, *or that the same has been reserved by the U. S. for any purpose whatever*, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land * * * * as shall be equal to such lands as the U. S. have sold, reserved, or otherwise appropriated, &c." This limitation operates to exclude from the grant any lands which, at the time the line of road is definitely fixed, have been by the U. S. reserved for any purpose whatsoever. It leaves the specific sections undetermined until the definite location of the road, and then excludes from the grant any lands to which adverse rights and interests have attached. Now, from the findings it appears that the line of
190 defendant's road adjacent to these lands was not definitely fixed until between the 5th and 20th of Sept., 1866, but on the 26th of July prior thereto they had been by the U. S. duly reserved in pursuance of positive and direct legislation therefor. It seems to us that they were, by the very terms of the acts under which defendant claims, excluded from the operation of its grant, and that, therefore, there is nothing in defendant's claim to interfere with the title which passed to the plaintiff by the completion and acceptance by the President of the United States of its road. As the facts seem to be indisputed we can but think the case of Johnson v. Towsley, 13 Wall., 72, leaves the courts free to apply the law correctly to those facts, and as in the view we have taken of the law the plaintiff has the better title to these lands, it becomes our duty to so adjudge. Inasmuch as no exception appears to have been taken to the facts as found, it is also our duty under the law to make, so far as the courts of this state are concerned, a final disposition of the
191 case. The judgment of the district court will, therefore, as to the lands adjudged by it to the defendant, be reversed, and the case remanded with instructions as to those lands to enter judgment for the plaintiff as prayed for in its petition.

All the justices concurring.

And thereupon the mandate of the supreme court to said district court of Davis county was issued, which said mandate is in words and figures as follows, to wit:

192 SUPREME COURT. } ss.
STATE OF KANSAS. }

The State of Kansas to the district court within and for the county of Davis, in the State of Kansas, greeting:

Whereas, in a certain civil action lately pending before you, wherein the Missouri, Kansas and Texas Railway Company was plaintiff, and the Kansas Pacific Railway Company was defendant, a judgment was rendered by you in favor of the said Missouri, Kansas and Texas Railway Company, on a transcript of which judgment and record said Kansas Pacific Railway Company prosecuted a petition in error to the Supreme Court within and for the State of Kansas;

And whereas, at the special August term of said supreme court, A. D. 1875, on consideration of the said petition in error, it was ordered and adjudged by the said supreme court that the
193 said judgment of the district court be reversed, with costs, and the case remanded with instructions as to the lands in controversy to enter judgment for the plaintiff as prayed for in its petition,—

You are therefore commanded, that without delay you cause execution to be had of the said judgment of the supreme court, according to law, the said petition in error to the contrary notwithstanding.

Witness my hand and the seal of said supreme court, affixed at my office, in the city of Topeka, on the 24th day of August, A. D. 1875.

[SEAL.] A. HAMMATT, *Clerk.*

194 THE STATE OF KANSAS. } ss.
SUPREME COURT. }

I, Abram Hammatt, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the foregoing is a true, correct, and complete transcript of all papers, pleadings, proceedings, and records in the case as therein entitled, as the same appears on file and of record in my office.

Witness my hand and official seal hereto affixed, at my office, in Topeka, Kansas, this 30th day of November, 1875.

[SEAL.] A. HAMMATT,
Clerk Supreme Court State of Kansas.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,

vs.

THE KANSAS PACIFIC RAILWAY COMPANY.

Argument for Appellants.

T. C. SEARS.

SEDALIA, MO.:
J. WEST GOODWIN, STEAM PRINTER AND BINDER.
1878.

Supreme Court of the United States.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE KANSAS PACIFIC RAILWAY COMPANY,
Defendant in Error.

The controversy between Plaintiff and Defendant concerns the title of ninety thousand (90,000) acres of land, more or less, lying within the counties of Morris, Davis and Dickinson, in the State of Kansas, involving the construction of the grants made to them and their assignors, respectively, by Congress, as well as the action of the two Companies, the action and ruling of the General Land Office of the United States and the effect to be given them.

STATEMENT OF STATUTES, WITHDRAWALS, ETC., ON PART OF DEFENDANT IN ERROR.

The Defendant in Error, formerly known as the Leavenworth, Pawnee & Western Railroad Company in Kansas, was one of the Companies subsidized by the "Act to aid in the "construction of a railroad and telegraph line from the Missouri

"River to the Pacific Ocean, and to secure to the Government "of the United States the use of the same for postal, military "and other purposes." Approved July 1, 1862. *Stat. at Large, Vol. 12, p. 489, et. seq.*

Section 9 of said Act, referring especially to this Company, is as follows:

"SEC. 9. *And be it further enacted*, That the Leaven- "worth, Pawnee & Western Railroad Company, of Kansas, are "hereby authorized to construct a railroad and telegraph line "from the Missouri River, at the mouth of the Kansas River, "on the south side thereof, so as to connect with the Pacific "Railroad of Missouri, to the aforesaid point, on the one "hundredth meridian of longitude west from Greenwich, as "herein provided, upon the same terms and conditions in all "respects, as are provided in this Act for the construction of "the railroad and telegraph line first mentioned, and to meet "and connect with the same at the meridian of longitude afore- "said; and in case the general route or line of road from the "Missouri River to the Rocky Mountains should be so located "as to require a departure northwardly from the proposed line "of said Kansas Railroad before it reaches the meridian of "longitude aforesaid, the location of this Kansas road shall "be made so as to conform thereto; and said Railroad through "Kansas shall be so located between the mouth of the Kansas "River, as aforesaid, and the aforesaid point, on the one "hundredth meridian of longitude, that the several Railroads "from Missouri and Iowa, herein authorized to connect with "the same, can make connection within the limits prescribed in "this Act, provided the same can be done without deviating "from the general direction of the whole line to the Pacific "Coast. The route in Kansas, west of the meridian of Fort "Riley to the aforesaid point, on the one-hundredth meridian "of longitude, to be subject to the approval of the President of "the United States, and to be determined by him on actual

"survey, and said Kansas Company may proceed to build said "Railroad to the aforesaid point on the one-hundredth meridian "of longitude west from Greenwich, in the Territory of "Nebraska."

Section 7, among other things, contained the following proviso:

"*Provided*, That within two years after the passage of this "Act said Company shall designate the general route of said "road, as near as may be, and shall file a map of the same in "the Department of the Interior, whereupon the Secretary of "the Interior shall cause the lands within fifteen miles of said "designated route or routes to be withdrawn from pre-emption, "private entry and sale; and when any portion of said route "shall be finally located, the Secretary of the Interior shall "cause the said lands hereinbefore granted, to be surveyed and "set off as may be necessary for the purposes herein named."

On the 17th day of July, 1862, the said Company, under the name aforesaid, filed in the General Land Office a map showing the general route of its road, which is shown upon the map attached to the record. On the 31st day of July, 1862, the land within fifteen miles of the line as located upon said map, were withdrawn by direction of the Commissioner of the General Land Office.

All of the lands included within this withdrawal, which had been in dispute between the two companies, were adjudged to the Defendant in Error, by the Court of original jurisdiction and no exception was taken thereto by Plaintiff in Error. *Vide Record, pp. 60, et. seq.*

So that no portion of the lands included in this first withdrawal are in controversy before this Court.

On the *second* day of July, 1864, an Act of Congress was duly approved, amendatory of the before mentioned Act, which "extended the time for designating the general route of said

"railroad, and of filing the map of the same" for "one year "from the time in said Act designated."

Section 9 of the same Act authorized the Company to form its junction with the Union Pacific Railroad at any point westwardly from the one-hundredth meridian of longitude, in case it should deem such westward connection more practicable or desirable. *13 Stat. at Large, pp. 356, et. seq.*

On the *1st day of July, 1865*, the last day authorized by the foregoing amendments, the Company filed a map, approved by its directors, in the office of the Secretary of the Interior, designating the general route of its road westwardly from Fort Riley, *up the Republican River, being the same route designated in the Company's map of July 17, 1862. Vide Record, p. 59.*

No further withdrawal was made upon the line of this route, other than that of July 31, 1862.

On the *3d day of July, 1866*, an Act of Congress was duly approved, amendatory of the last named Act of July 2, 1864. *14 Stat. at Large, pp. 79 and 80.*

The name of the Company had been duly changed, and was then known as the "Union Pacific Railway Company, Eastern Division"

The portion of this Act bearing upon the consideration of this controversy, is embraced in Section 1, and is as follows:

Be it enacted, etc., "That the Union Pacific Railway Com- "pany, Eastern Division, is hereby authorized *to designate the "general route of their said road and to file a map thereof as now "required by law*, at any time before the first day of December, "eighteen hundred and sixty-six; and upon the filing of the "said map, showing the general route of said road, the lands "along the entire line thereof, so far as the same may be "designated, shall be reserved from sale by order of the "Secretary of the Interior."

On the 11th day of July, 1866, in pursuance of the authority of this last named Statute, the said Company filed its

map with the Secretary of the Interior, designating the general route of its said Railroad, which map designated the line of its route from Fort Riley to the western line of the State of Kansas, by the way of the Smoky Hill River; that thereupon in accordance with said Act of Congress, the lands upon that route were withdrawn *from sale* by order of the Secretary of the Interior. They embrace all the lands in controversy in this suit. *Record, p. 45.*

STATEMENT OF ORGANIZATION, STATUTES, WITHDRAWALS, ETC., ON PART OF PLAINTIFF IN ERROR.

On the 3d day of March, 1863, an Act of Congress was duly approved, entitled, "An Act for a grant of lands to the "State of Kansas, in alternate sections, to aid in the construct- "ion of certain railroads and telegraphs in said State." *12 Stat. at Large, pp. 772, et. seq.*

This grant was made for the benefit of two Railroads—the Leavenworth, Lawrence & Galveston Railroad Company and the Atchison, Topeka & Santa Fe Railroad Company. The former commencing at the city of Leavenworth and running southerly in the direction of Galveston, to the south line of the State of Kansas; the latter commencing at Atchison, thence *via* Topeka to the western line of the State, in the direction of Fort Union and Santa Fe. The Act provided the same subsidy for the Atchison, Topeka & Santa Fe Company for the construction of a branch from where its Railroad should cross the Neosho River, down the Neosho Valley to a point where the Leavenworth, Lawrence & Galveston Railroad entered the said valley, as was granted the main line.

As will be seen, by reference to the map, the Atchison, Topeka & Santa Fe Railroad crossed the Neosho river near

the city of Emporia, and the Leavenworth, Lawrence & Galveston Railroad entered the Neosho Valley in the vicinity of Humboldt, in the county of Allen.

The State of Kansas, by an Act of its Legislature, approved on the 9th day of February, 1864, accepted the provisions of said grant and inserted other provisions as to a grant for that portion of the Neosho Valley lying north of Emporia. The Act is as follows:

"Act of the Legislature of Kansas, accepting the provis-
"ions of the foregoing Act, entitled:

"An Act to accept a grant of lands made to the State of
"Kansas by the Congress of the United States, to aid in the
"construction of certain railroads and telegraphs in said State,
"and to apply the same to construction of such roads and
"telegraphs" Approved February 9th, 1864.

"*Be it enacted by the Legislature of the State of Kansas:*

"SECTION 1. The State of Kansas hereby accepts the
"grant of lands made to this State by the Congress of the
"United States by Act entitled, 'An Act for a grant of lands
"in the State of Kansas, in alternate sections, to aid in the con-
"struction of certain railroads and telegraphs in said State,'
"approved March 3, 1863, upon the terms and conditions set
"forth in said Act of Congress.

"SEC. 2. In consideration that the Leavenworth, Law-
"rence & Fort Gibson Railroad and Telegraph Company shall
"construct a railroad and telegraph from the city of Leaven-
"worth, by the way of the town of Lawrence, and *via* the Ohio
"City crossing of the Osage River to the southern line of the
"State, in the direction of Galveston Bay, in the State of
"Texas, with a branch from Lawrence, by the valley of the
"Wakarusa River, to the point on the Atchison, Topeka &
"Santa Fe Railroad, where said road intersects the Neosho
"River; the State of Kansas hereby agrees to grant, bargain
"and sell to said Leavenworth, Lawrence & Fort Gibson Rail-

"road Company all that portion of the lands granted to this "State by the above named Act of Congress, applicable to the "construction of the above described railroad and telegraph, "and the above described branches thereof, and which shall be "selected in conformity with the provisions of the above "named Act of Congress. And the said State of Kansas further "agrees, and it is hereby enacted, that so soon as said Leaven- "worth, Lawrence and Fort Gibson Railroad Company shall "complete any twenty consecutive miles of either said road or "branch, as required by said Act of Congress, the Governor of "this State shall, by patent, convey to such Company all the "land granted as aforesaid, which shall be situated opposite to "and within a limit of ten miles of the line of said section of "road thus completed, extending along the whole length of said "completed section, and no further, and so from time to time "until said road and branch shall be completed; and whenever "said road, branch and telegraphs shall be completed, as "required by said Act of Congress, the Governor shall convey "to said Company all the remaining lands granted by said Act "of Congress, and applicable to the construction of said road, "branch and telegraph; *provided, however*, that said agreement "for the sale of said lands, and all conveyances thereof, shall "be for the uses and purposes, and subject to the conditions, "reversions and provisions set forth and contained in said Act "of Congress, and in this Act; *and provided further*, that at "the point of intersection of said road and branch, there shall "be an equal division of the lands granted to aid in building "said road and branch.

"SEC. 3. In consideration that the Atchison, Topeka & "Santa Fe Railroad Company (formerly the Atchison & Topeka "Railroad Company), shall construct a railroad from the city of "Atchison *via* Topeka, to the western line of said State, in the "direction of Fort Union and Santa Fe, New Mexico, with a "branch from where said road crosses the Neosho, down said

"Neosho Valley to the point where the Leavenworth, Lawrence "& Fort Gibson Railroad enters said Neosho Valley, the State "of Kansas hereby agrees to grant, bargain and sell to said "Atchison, Topeka & Santa Fe Railroad Company, all that "portion of the lands granted to this State by the above named "Act of Congress, applicable to the construction of the herein "above described railroad and branch thereof, and which shall "be selected and located in conformity with the provisions of "the above named Act of Congress. And the said State doth "further agree, and it is hereby enacted, that whenever said "Atchison, Topeka & Santa Fe Railroad Company shall com-"plete any twenty consecutive miles of either said road or "branch, as required by said Act of Congress, the Governor of "this State shall, by patent, convey to said Atchison, Topeka & "Santa Fe Railroad Company, all the lands granted as afore-"said, and which shall be situated opposite to and within a limit "of ten miles of the line of said section of road thus completed, "extending along the whole length of said completed section, "and no further, and so from time to time, until said road and "branches shall be completed, as required by said Act of Con-"gress; and whenever said road and branch shall be thus com-"pleted, the Governor of this State shall convey to said Company "all the remaining lands granted by said Act of Congress, and "applicable to the construction of said road and branch; "*provided, however*, that said agreement for the sale of said "lands and all conveyances thereof, shall be for the uses and "purposes, and subject to the conditions, reversions and provis-"ions set forth and contained in said Act of Congress and in "this Act; *and provided further*, that if the Congress of the "United States shall, on or before the 4th day of March, 1866, "consent that the Neosho Valley Branch of the above named "road may be extended so as to intersect the Union Pacific "Railroad Eastern Division, at or near Fort Riley, and shall "make a grant of land for such extension, of like amount, with

"that granted per mile for the construction of the herein above-
"named principal road, then said Atchison, Topeka and Santa
"Fe Railroad Company shall proceed to construct such branch
"to such intersection, on the terms and conditions herein above
"described, applicable to construction of such main road.

"SEC. 4. Each of said Companies shall file in the office of
"the Secretary of State, within six months after the passage of
"this Act, a copy of the acceptance, by the Board of Directors
"of such Company, of the provisions of this Act, duly certified
"under the seal of said Company; and, in default thereof, all
"grants and provisions herein contained shall, as to the Com-
"pany so failing, cease and be void.

"SEC. 5. Said Companies shall, respectively, within one
"year after its road shall have been definitely located, file in
"the office of the Secretary of State, a map, or profile thereof,
"and of the land reserved or taken for the use of said road;
"and shall also file maps of the parts of such roads and lands
"in the office of the Register of Deeds of the several counties
"through which such roads shall pass.

"SEC. 6. The right of way upon and across all lands
"belonging to this State, to a distance of one hundred feet
"in width, together with the right to construct and use, upon
"such lands, all turn-outs and water stations, is hereby granted
"to said Companies, respectively, for the use of their respective
"roads.

"SEC. 7. Immediately after the passage of this Act, the
"Secretary of State shall cause the same to be published in the
"*Topeka Tribune*, and it shall thereafter be in force. Approved
"February 9th, 1864."

The State herein agreed that if Congress should extend this grant from the point where the Atchison, Topeka & Santa Fe Railroad crosses the Neosho River, *i. e.*, at the northern end of the Neosho Valley Branch at Emporia, to a point of intersection with the Union Pacific Railroad Eastern Division, at or

near Fort Riley, then the said Atchison, Topeka & Santa Fe Railroad Company should construct such branch to such intersection, on the terms and conditions applicable to the construction of the main line.

The conditions and provisions of this Act were accepted by the Atchison, Topeka & Santa Fe Railroad Company, on the 16th day of February, 1864. *Record, p. 51.*

On the *first* day of July, 1864, the Act of Congress making the grant between the points named was duly approved. *13 Stat. at Large, p. 339.*

This grant was made subject to all the provisions, restrictions, limitations and conditions of the first above named Act, approved March 3, 1863, and includes within its limits all the land in this controversy. See map showing these grants.

The Plaintiff in Error was incorporated under the laws of the State of Kansas, on the 20th day of September, 1865, under the name of the Union Pacific Railway Southern Branch. Its name has been duly changed to the Missouri, Kansas & Texas Railway Company, and is the same corporation named as contracting with the Atchison, Topeka & Santa Fe Railroad Company, as hereinbefore mentioned. *Record, p. 50.*

On the 19th day of March, 1866, the said Atchison, Topeka & Santa Fe Railroad Company and the Plaintiff in Error, under its then corporate name, entered into a contract by which the former Company transferred to the latter all its rights, interests, privileges, grants, etc., touching the construction and operation of a railway "from a point at or near Fort "Riley, down the Neosho Valley to where the Leavenworth, "Lawrence & Fort Gibson Railroad might enter the Neosho "Valley." The Plaintiff in Error assumed all the duties, conditions and obligations imposed upon the Atchison, Topeka & Santa Fe Railroad Company, arising under the law of the State of Kansas, or connected with or arising out of the grants

of land made by Congress. *For full copy of contract, see Record, p. 41, et seq. For finding of Court, see Record, p. 52.*

On the 26th day of February, 1867, the Legislature of Kansas ratified and confirmed said agreement by resolution, duly approved by the Governor, as follows, viz:

"*Resolved*, That the transfer and assignment of the Atchi-"son, Topeka & Santa Fe Railroad Company made and executed "on the 19th day of March, 1866, to the Union Pacific Railway "Southern Branch, of all the rights, title, interest and "authority, privileges, immunities and liabilities held, acquired, "possessed and enjoyed for constructing, maintaining, operating "and enjoying a railroad from a point on the Union Pacific "Railway Eastern Division, at or near Fort Riley, down the "Neosho Valley to where the Leavenworth, Lawrence & Fort "Gibson Railway may intersect the Neosho Valley, be, and the "same is hereby ratified and confirmed, *provided* the term fran-"chise as used in the said transfer and assignment, shall not be "construed to impair in any way the charter of said Atchison, "Topeka & Santa Fe Railroad Company." *Vide Record, p. 52.*

The Plaintiff in Error definitely located its line from a point at or near Fort Riley to Council Grove, a distance of thirty-six (36) miles, between the 5th and 21st days of September, 1866. *Record, p. 53.*

The time of the definite location by Defendant in Error does not appear.

Both Companies claimed to have complied with the Acts of Congress, by virtue of which, respectively, they made claim to the lands. Plaintiff in Error completed its Railroad in the manner and within the time specified in the Acts of Congress, and the same was duly accepted by the State and the General Government. *See Record, pp. 53 and 54.*

Defendant in Error claims to have done the same. *See Record, pp. 46, et seq.*

Application was made to the General Land Office by Defendant in Error for the lands embraced within the limits of the grant to the State of Kansas for the benefit of the Missouri, Kansas & Texas Railway Company. The Land Office decided that the State of Kansas was entitled to the lands for the benefit of Plaintiff in Error. Its decision was affirmed by the Secretary of the Interior, the lands were certified to the State of Kansas, and patents issued accordingly. This action was thereupon brought in the State Courts to vacate the patents and to obtain a decree adjudging the title in Defendant in Error. That Court decided that all the lands embraced within the withdrawals of July 31st, 1862, equitably belonged to Defendant in Error, and so decreed. But that all the other lands described in Plaintiff's petition, and embraced within the limits of Plaintiff in Error's grant, had been properly patented. From that decision Defendant in Error took an appeal to the Supreme Court of the State of Kansas, which Court decided that the lands were reserved from the grant to Plaintiff Error, by virtue of the withdrawal of July 11th, 1866, in favor of Defendant in Error, and decreed accordingly.

The question presented to this Court is, whether said withdrawal operated upon Plaintiff in Error's grant, by taking the lands therefrom and giving the same to the Defendant in Error.

ASSIGNMENT OF ERRORS.

1. That the Supreme Court of the State of Kansas did decree that the grant to the Plaintiff in Error never attached to the lands described in the petition of Plaintiff below, but that full title thereto passed to Defendant in Error by the construction and acceptance of its road.

2. That the said Court did decree that said lands belonged to the Defendant in Error, and did render judgment for said Defendant in Error, as prayed for in its petition.

3. That the said Court adjudged that the patents to said lands were null and void, and that the same should have been issued to the said Defendant in Error.

ARGUMENT FOR PLAINTIFF IN ERROR.

I.

The grant under which Defendant in Error claims title to the lands in controversy was made in the same Act under which the Union Pacific Railroad Company was incorporated and subsidized. *12 Stat. at Large, pp. 489, et seq.*

The Act after incorporating that Company, provides, "And "the said corporation is hereby authorized and empowered to "lay out, locate, construct, furnish, maintain and enjoy a con- "tinuous railroad and telegraph, with the appurtenances, *from a "point on the one-hundredth meridian of longitude west from Green- "wich, between the south margin of the valley of the Republican "River and the north margin of the valley of the Platte River, in the "Territory of Nebraska, to the western boundary of the Nevada "Territory.*"

By reference to the map, it will be seen that this point which is designated, in subsequent portions of the Act as the "initial point," is in the eastern part of the county of Lincoln, in the State of Nebraska.

The Leavenworth, Pawnee & Western Railroad Company, (now Kansas Pacific,) by the terms of the same Act, was to join or intersect the Union Pacific Railroad at this point. It had a land and a bond subsidy for the construction of a railroad from a point on the Missouri River to connect with the last named road on the *one-hundredth meridian of longitude* west from Greenwich. *Vide Sec. 9 of Stat.*

The plan or policy of the Government in granting these subsidies is apparent. A system of railroads was contemplated from the States of Missouri, Kansas and Iowa, connecting at

the one-hundredth degree of longitude in the Platte Valley, and meeting at the "initial point" of the Union Pacific Railroad Company. As to the Leavenworth, Pawnee & Western Railway, the line from the Missouri River to Fort Riley was practically located by the Act itself. But west of the meridian of Fort Riley the same "was subject to the approval of the "President of the United States, and to be determined by him "on actual survey."

In accordance with the conditions and requirements of the Act, the Company fixed the general route of its road "west of "the town of Lawrence, in said State, (Kansas,) from a point "on the north bank of the Kansas River, opposite said town, "thence west along the left bank of said river, to the left bank "of the Republican Fork thereof, *thence along said bank of said "Republican River or fork to the one-hundredth meridian of longi-"tude west from Greenwich.*" *Vide Record, p. 44.*

A map thereof was filed with the Commissioner of the General Land Office, and on the 17th day of August, 1862, a withdrawal was ordered, as provided by law. This withdrawal is indicated upon the "exhibit map," made a part of the "record." It embraced a portion of the lands originally patented to the Plaintiff in Error and all the same lands adjudged to Defendant in Error, by the Court below, and to which no exception was taken. *Vide Record, p. 60.*

Under the Act of July 2*d*, 1864, nothing was done by Defendant in Error, except the filing of the map of its general route. While permission was given it to connect with the Union Pacific Railroad at any point westerly of the "initial point," aforesaid, in case it should deem such connection more practicable or desirable, it did not avail itself of such permission, but on the contrary, adhered to its old route, as fixed in 1862, and filed its map, locating its general route, up the Republican River, in the direction of the original "initial point." It was one of the conditions of its original grant that

it should, "within two years after the passage of the Act," designate the "general route of its road," and to file a map, etc. *Union Pacific Act, Sec. 7.*

In accordance with the Act of July 2d, 1864, it had filed its map, as required by law, and designated its old route up the Republican, but neither asked nor received a withdrawal of the lands in its favor; hence, none of the lands in controversy were affected by it.

The Company, after the passage of this Act, had its option to go to the one-hundredth meridian or to the west of it. It could not do both. It was required within one year after its passage, to make its selection. It did so, and selected the route known as the Republican, *i. e.*, to the one-hundredth meridian. Having done this, it was, as to this subject, *functus officio. Vide 11, Opinions of Attorney Generals, 462.*

The decision of the Government, as indicated in this opinion, doubtless gave rise to the passage of the Act of July 3d, 1866, and it is under this Act and proceedings had in compliance therewith, that any pretense of title could be interposed, as against the grant of the Plaintiff in Error.

Prior to the passage of this last named Act, it had exercised all its rights and privileges as to the location of its route and the withdrawal of any of the public lands. Having had the benefit of the extension of one year from the time designated in the original Act, it deliberately confirmed its first choice as to route, and on the 1st day of July, 1865, filed its map in accordance therewith.

It certainly needs no argument to show that it neither acquired, nor could acquire, any rights, inchoate or otherwise, as to any other route, and especially to any of the public lands not within the limits of the route it had thus chosen.

At the time, therefore, of the passage of this last named Act (July 3d, 1866), the Defendant in Error had acquired no rights or interest whatever, in the lands in controversy, and if

ever it had any, as against Plaintiff in Error, they must be authorized and flow from said Act and the proceedings thereunder.

II.

It now becomes necessary to determine the status and rights of the Plaintiff in Error at the time of the passage of the Act of July 3d, 1866.

The Act of March 3d, 1863, (*12 Stat. at Large, pp. 772, et seq.,*) had granted to the State of Kansas, for the purpose of aiding in the construction of the Atchison, Topeka & Santa Fe Railroad, every alternate section of land, designated by odd numbers, for ten sections in width on each side of its road and its branches. This branch commenced at the point where it crossed the Neosho River, and ran down the Neosho Valley to a point where the Leavenworth, Lawrence & Galveston Railroad Company (called in the Act the Leavenworth, Lawrence & Fort Gibson Railroad Company,) entered the said Neosho Valley.

The State of Kansas, on the 9th day of February, 1864, accepted the grant with all its conditions, (*Vide Act, p. 6, ante,*) with the addition that if Congress should, prior to the 1st day of March, 1866, extend the provisions of the Congressional Act to the extension of the Neosho Valley Branch, so as to intersect with Union Pacific Railroad Eastern Division, at or near Fort Riley, that the Atchison, Topeka & Santa Fe Railroad Company should proceed to construct such branch to such intersection.

This Act of the Legislature was promptly accepted by the Atchison, Topeka & Santa Fe Railroad Company, on the 16th day of February, 1864. *Record, p. 51.*

On the *first day of July, 1864*, Congress passed the Act and subsidized the Neosho Branch of said road. *13 Stat. at Large, p. 339.*

This constituted, with the previous Act of March 3d, 1863, a grant to the State of Kansas from a point at or near Fort

Riley *via* Council Grove, and down the Neosho Valley to a point where the Leavenworth, Lawrence & Galveston Railroad entered the Neosho Valley, for the purpose of aiding the Atchison, Topeka & Santa Fe Railroad Company in the construction of a railroad over that route. Within the limits of this grant are included all the lands in controversy before this Court.

The agreement between the Atchison, Topeka & Santa Fe Railroad Company and the Plaintiff in Error, then known as the Union Pacific Railway Company Southern Branch, and its ratification by the State, are set forth at p. *11, ante.*

Thus, on the 3d day of July, 1866, the Plaintiff in Error, as the Assignee of the Atchison, Topeka & Santa Fe Railroad Company, had succeeded to all its rights and assumed all its liabilities, and upon the performance of the conditions of the grants, was entitled to the lands granted, among which were all the lands in controversy. *In other words, had the Railroad at that time been completed, the Company would have been entitled to have received its patents.*

All of this the opinion of the Supreme Court of Kansas virtually concedes, but insists that by virtue of said Act, and the proceedings in compliance therewith, the exceptions named in our grant became operative to take away from Plaintiff in Error the rights thus acquired. That Court, after stating the facts constituting the claims of both companies in its opinion at *page 73 of Record*, gives the ground of its decision as follows: "It is pro-
"vided that in case it shall appear that the United States have,
"when the line or routes of said road and branches are definitely
"fixed, sold any section or any part thereof granted as aforesaid,
"or the rights of pre-emption or homestead settlement has
"attached to the same, *or that the same has been reserved by*
"*the United States for any purpose whatever*, then it shall be the
"duty of the Secretary of the Interior to cause to be selected
"for the purpose aforesaid, from the public lands of the United
"States nearest to the tiers of sections above specified, so much

"land * * * as shall be equal to such lands as the United "States have sold, reserved or otherwise appropriated, etc. This "limitation operates to exclude from the grant any lands, which "at the time the line of road is definitely fixed, have been, by "the United States, reserved for any purpose whatsoever. It "leaves the specific sections undetermined until the definite loca- "tion of the road, and then excludes from the grant any lands "to which adverse rights and interests have attached. Now, "from the findings, it appears that the line of Defendant's road "adjacent to these lands was not definitely fixed until between "the 5th and 20th of September, 1866, but on the 26th of July "prior thereto, they had been by the United States duly re- "served in pursuance of positive and direct legislation therefor. "It seems to us that they were, by the very terms of the Acts "under which Defendant claims, excluded from the operation of "its grant, and that therefore there is nothing in Defendant's "claim to interfere with the title which passed to the Plaintiff "by the completion and acceptance by the President of the "United States of its road."

This decision is to the effect that, although Congress made a grant of lands to a State "for the purpose of aiding in an object of "internal improvement," and prescribed the terms and conditions thereof, as to the time of performance or otherwise, yet it intended to, and did reserve to itself the right to make another grant to a different party, of the same lands and for the same purpose; that this was what was intended to be reserved to the United States in the exception quoted by the Court, and upon the strength of which it took the lands in controversy from our grant and gave them to the Defendant in Error. In other words, that Congress intended, that if to-day it granted to one Company a portion of the public domain, to aid in building a railroad and giving it ten years in which to perform the conditions imposed, it may to-morrow grant the same lands to another Company for the same purpose, and that the rights of

each should be determined by their fleetness in reaching the line of their proposed route and fixing a few stakes in the ground. Such a purpose and intention, if conceived and practiced by an individual, would subject him to the sharpest criticism. But such was not the intention of Congress. Its purpose is not left in any doubt, but is clearly indicated.

The Supreme Court of Kansas failed to notice that in our grant there were *two* classes of reservations—one of which attached at the time of the definite location of the line, the other at the passage of the Act—one designed to retain the operation of the land laws until the definite location of the line, and to reserve to the United States the right to appropriate any of the public lands to *its own use*, under existing laws, the other intended to prevent Congress from doing what that Court says it has done in effect in this case.

These reservations are as follows:

a. "But in case it shall appear that the United States have, "when the lines or routes of said road and branches are *definite-* "*ly fixed*, sold any section or part thereof, granted as aforesaid, "or that the right of pre-emption or homestead settlement has "attached to the same, or that the same has been reserved by "the United States for any purpose whatever, then it shall be "the duty of the Secretary of the Interior to cause to be "selected for the purpose aforesaid, from the public lands of "the United States nearest to tiers of sections above specified, so "much land in alternate sections or parts of sections, designated "by odd numbers, as shall be equal to such lands as the United "States have sold, reserved or otherwise appropriated, or to "which the rights of pre-emption or homestead settlement have "attached as aforesaid."

b. "And provided, that any and all lands *heretofore* reserved "to the United States by any Act of Congress, or in any other "manner by competent authority, *for the purpose of aiding in any* "*object of internal improvement*, or for any other purpose what-

"soever, be, and the same are hereby reserved to the United "States from the operations of this Act," etc. *Vide Act March 3, 1863.*

Here are two classes of reservations becoming operative at different times and clearly embracing two classes of subject matter. *If the construction claimed as to the first be correct, the insertion of the second was a work of supererogation,* because the former would cover every conceivable land subsidy and the latter would be entirely inoperative. It makes no difference whether the lands were reserved or sold prior or subsequent to the passage of the Act, if the decision of the Supreme Court of Kansas be the true interpretation.

But the true meaning is manifest. In the first reservation the status of the lands is determined when "the lines or routes "of said road and branches are definitely fixed," and embraces:

1st. Those that are "sold or those to which the right of "pre-emption or homestead settlement has attached."

2d. Those "that have been reserved by the *United States* "for any purpose whatsoever."

It should be here noted that the language in the two reservations as to the authority creating or authorizing them is different. In the first it is "reserved by the *United States.*"

In the second it is reserved by "*any Act of Congress,*" etc., clearly indicating in the one case that reference is had only to those matters that the proper officers of the Government have the power to do under existing laws, and in the other to those that require the action of Congress. Besides, the application to the subject matter shows this.

The Government would make no grant that should interfere with the settlement of the public domain, until the railways that were its beneficiaries should have so far advanced in their enterprises as to have definitely located their lines. Hence, settlers, pre-emptors and homesteaders should have the right to purchase, pre-empt and enter the public lands under the general existing

laws of the United States, until the routes of such railways had become fixed in accordance with the terms of their grant. The reasons of such a policy are obvious: The Government desires, and has always desired, to facilitate as rapidly as possible the settlement and development of its unoccupied lands. It was in accordance with this policy that the Statute of *March 27, 1854* (*Rev. Stat., Sec. 2281*), was passed, which enacted "That every "settler on public lands which have been, or may be, withdrawn "from market in consequence of proposed railroads, and who "had settled thereon previous to such withdrawal, shall be en- "titled to pre-emption at the ordinary minimum of the lands "settled on and cultivated by them."

The intention of Congress, then, in providing that lands thus sold, or pre-empted or entered by settlers should be exempted from the operation of the Act, was to keep the public lands open to the operation of the general laws regulating the sale of the public lands until the railway companies should be in a probable condition to proceed with their work.

The meaning of the second clause in the first reservation, viz.: Those "that have been reserved by the *United States* for "any purpose whatsoever," is equally obvious. The purpose clearly was to reserve to the United States the right to take, appropriate and use any of their public lands that any contingency or policy required they should take for *their own use*. If it needed lands for a military or Indian reservation, or for any other purpose *of its own*, it was proper that it should reserve to itself that right and power. Moreover, the construction we claim is evident when it is observed that the Secretary of the Interior was authorized to select from the public lands so much as should "be equal to such lands as the United States have *sold*, "*reserved or otherwise appropriated*, or to which the rights of *pre-* "*emption* or *homestead settlement* have attached." Here is unequivocal reference to the classes of cases in which the *United States*—not Congress, which alone can dispose of the public lands

—are authorized to interfere with the grant to the State of Kansas.

"Sold, reserved, or otherwise appropriated," *i. e.*, a sale under then existing general laws, or reserved or appropriated for the *use* of the United States. In other words "appropriated" to such uses and purposes as the exigencies of Government should require—*not* "otherwise *disposed* of" but, "otherwise *appropriated*." If there was no proviso in the Act applying to grants "for the purpose of aiding in any object of internal im-"provement," it is clear that the language above employed, would not, by any reasonable construction, embrace grants of that character.

But the second reservation, as contained in the last proviso before cited, removes any possible doubt that might arise as to the application of these words, and confirms the construction we claim. The subject matter of it is, the effect of grants made by Congress "for the purpose of aiding in any object of internal "improvement," and the particular effect the Act under which Plaintiff in Error claims shall have upon those grants. It declares unequivocally that "any and all lands *heretofore* reserved to the "United States," etc., etc., are hereby "reserved to the United "States from the provisions of this Act" It is an exception in favor of certain reservations "*heretofore" made*, but *not* in favor of any *thereafter* to be made. It excepts all lands covered by other grants "heretofore" made, but does not make any exception to those thereafter to be made. Is it sense to argue that Congress inserted this proviso to cover only that class of "heretofore" made grants, if the first reservation included *all* Congressional grants and reservations as the Supreme Court of Kansas argues and decides? If the construction of that Court be correct, the proviso last named, as before stated, so far as applicable to railway grants, was a work of supererogation, because by such construction the first reservation covers every conceivable case. That Court gives it a broad, universal application. The special

proviso as to Congressional grants proves conclusively that they were not embraced in, or thought of in the first reservation. But why provide in the Act that these reservations should attach at different times? One when the line was definitely located, the other upon the passage of the Act. For very obvious reasons :

1st. The Government, as we have before seen, reserved to itself, *for its own use* and purposes, and upon grounds of public policy, the right to sell, reserve and appropriate the lands covered by the grant, until the actual location of the line.

2nd. The Government recognized that principle of common honesty, that having theretofore made grants of a portion of its public domain for a valuable consideration, it was bound to respect and protect them.

It said to the Kansas Pacific Railway Company, "we will "reserve the operations of this Act from affecting in any man- "ner your grant under the Act of 1862, because made hereto- "fore," but it did *not* say in terms or by implication, in this Act or elsewhere, that "we have reserved from the Act of March 3d, "1863, all grants hereafter to be made in your favor, and "especially the Acts of 1864 and 1866."

Yet, such is the practical effect of the doctrine enunciated by the Supreme Court of Kansas.

The fact that Congress made use of the word "heretofore," is conclusive evidence that it did not intend that the proviso should apply to grants made thereafter. The old maxim, "*expressio unius est exclusio alterius*," is applicable; and the further fact that it did not specify in the first reservation, grants of land to aid in internal improvement, is sufficient evidence that this class was not intended to be included therein.

Again, this construction is in harmony with good faith, common honesty, fair dealing and plain equity.

It would be inharmonious with either, for the Government to insert in our grant a provision that it should not interfere

with grants previously made, and then incorporate in it a reservation that should constitute it the legitimate prey of every subsequent Legislative grant, incorporating in its very vitals the elements that might constitute its disintegration and destruction.

The Supreme Court of Kansas decides that the Government has done this in the case at bar.

I do not believe it.

The spirit and intent of the reservation upon which the lower Court relied to take the lands in controversy from the operation of our grant, are clearly developed in the opinion of this Court in Railway Company vs. United States, 2d Otto, 741, *et seq.* At page 748 the Court says:

"The scope and effect of the Act of 1863, cannot, in our "opinion, be mistaken. The different parts harmonize with "each other and present in a clear light, the scheme as an "entirety. Kansas needed railroads to develop her resources "and Congress was willing to aid her to build them, by a grant "of a part of the national domain, in a condition at the time to "be disposed of. It was accordingly made of alternate sections "of land, within ten miles on each side of the contemplated "roads. Formerly, lands which would probably be affected by "a grant, were, as soon as it was made, if not in advance of it, "withdrawn from market. But experience proved that this "practice retarded the settlement of the country, and at the "date of this Act, the rule was not to withdraw them until the "road should be actually located. *In this way, the ordinary work-*"*ing of the land system was not disturbed. Private entries, pre-*"*emption and homestead settlements, and reservations for special*"*uses, continued within the supposed limits of the grant, the same as*"*if it had not been made.*"

III.

What was the character of the estate granted to the State of Kansas by the terms of the Acts of March 3d, 1863, and July 1st, 1864?

Happily, we are not at sea as to this branch of the case. This Court has repeatedly construed grants of this character, and as the decisions previously made were re-affirmed and announced with great clearness and emphasis, in the case of the Leavenworth, Lawrence & Galveston Railroad Company vs. United States, 2d Otto, before cited, I quote from that opinion. The Court says:

"It creates an immediate interest and does not indicate a "purpose to give in future. 'There be, and is hereby granted,' "are words of absolute donation, and impart a grant *in presenti.* "This Court has held that they can have no other meaning; "and the Land Department, on this interpretation of them, "has uniformly administered every previous similar grant. "[*Railroad Company vs. Smith, 9 Wall., 95; Schulenberg vs. "Harriman, 21 Wall., 60; 1 Lester, 513; 8 Opin., 257; 11 "Opin., 47.*"]

And further, "they vest a present title in the State of "Kansas, though a survey of the lands and a location of the "road are necessary to give precision to it and attach it to any "particular Act. The grant then becomes certain, and by "relation has the same effect upon the selected parcels as if it "had specifically described them;" and at pages 7 and 8 the Court continues: "We have before said that the grant itself "was *in presenti*, and covered all the odd sections, which should "appear on the location of the road, to have been within the "grant when it was made. *The right to them did not, however, "depend on such location, but attached at once on the making of "the grant.* It is true they could not be identified until the line "of the road was marked out on the ground; but as soon as "this was done, it was easy to find them." Immediately upon the passage of the Act, and its acceptance by the State of Kansas, an "immediate interest" was created. That acceptance was made on the 9th day of February, 1864, and dated back by relation to the date of its passage.

"The right to them did not, however, depend on such "location, but *attached at once on the making of the grant.*"

By the judicial construction of the Act under which we now claim, it is held that the right of the State of Kansas to these lands, "attached at once on the making of the grant."

How did she lose that right? The fact that the *right once vested* places us upon the defensive, and the Defendant in Error must prove how, why and when these rights were divested; not by implication, not by ambiguous words, but by plain, unmistakable legislative language, declaring in *hæc verba*, that the exact conditions have arisen which took away these rights from the State of Kansas.

The rule in such cases has been settled by this Court, and I refer to the decision in the case of *United States vs. Dickson, 15 Peters, 165.* It is this: When the granting part of an Act in clear and unmistakable terms grants a particular subject, he who relies on a proviso to take something out of that grant, must show that the *language and intent* of that proviso clearly do it.

The language of the Court, in the opinion given by Mr. Justice Story, is this:

"Passing from these considerations to another, which neces- "sarily brings under review the second point of objection to the "charge of the Court below, we are led to the general rule of "law which has always prevailed, and becomes consecrated "almost as a maxim in the interpretation of statutes, that where "the enacting clause is general in its language and objects, and "a proviso is afterwards introduced, that proviso is construed "strictly, and takes no case out of the enacting clause which does "not fall fairly within its terms. In short, a special proviso "carves special exceptions only out of the enacting clause, *and,* "*those who set up any such exception must establish it as being* "*within the words as well as within the reason thereof.*"

And in *Thornhill vs. Hull* (2 Clark, and Finley 36), the Lord Chancellor said :

" I hold it to be a rule that admits of no exception in the " construction of written instruments, that where one interest is " given, where one estate is conveyed, where one benefit is be- " stowed in one part of an instrument by terms upon which, if " it stood alone, no man breathing, be he lawyer or be he layman, " could entertain a doubt, in order to reverse that opinion to which " the terms would of themselves, and standing alone have led, it is " not sufficient that you should create a doubt ; it is not sufficient " that you should show a possibility; it is not even sufficient that " you should deal in probabilities, but you must show something " in another part of that instrument which is as decisive the one " way, as the other terms were decisive the other way, and that " the interest first given cannot be taken away, either by *tacitum* " or *dubium*, or by *possibile* or even by *probabile*, but that it must " be taken away, and can only be taken away, by *expressum et* " *certum*."

He who asserts that the proviso, upon which the Supreme Court of Kansas relies, has taken something out of our grant clearly made by the enacting part of the law and judicially determined, must show it by the " words and reason." Does this proviso in "words and reason," or either, clearly indicate that it was the intention of Congress to reserve to itself the right to make another grant of the same lands " for the purpose of aid- " ing any object of internal improvement?" If it does not, there is an end of Defendant in Error's claim.

I respectfully insist that the " words and reason " both concur in clearly indicating that such was not the intention of Congress. That in the Act of 1863, in treating of reservations to aid in objects of internal improvements, it treated and designated them as a distinct, separate and independent Act of the Government, for which separate legislation was needed, and which no former proviso of the Act embraced ; and the necessary presumption is

that in thus treating that branch of the grant in express and unequivocal words, no inference can be drawn that it intended to make any reservations that were not clearly indicated by the words.

As Congress did make reservation in favor of grants "heretofore made" in *hæc verba*, and specified none others, the inference is both reasonable and irresistible that it did not intend to embrace any made thereafter. And as it treated the subject of grants as a distinct, independent proposition in a special proviso, it is quite certain that it had not embraced that subject matter in any previous portion of the granting Act.

An additional reason why the construction of this Court in L., L. & G. R. R. Co. vs. United States should particularly obtain in this case, arises from the definite location of the grant by the Act itself. The grant was for a short piece of railway. The initial, central and terminal points were designated. The language is, "to aid in the construction of a railroad and telegraph "line from Emporia *via* Council Grove, to a point near Fort "Riley, on the Branch Union Pacific Railroad." The distance is sixty-one miles. A glance at the map shows that but one line could be adopted between the points named. It was demonstrably certain what lands, as a mass, were granted. A quarter section here and there on the edges of the grant might fall within or without its range, upon exact survey; but the bulk of the grant was fixed to a certainty, by the Act itself—as much fixed as any grant could be by natural landmarks and boundaries.

In the language of Attorney General Cushing, in the Portage City case: (*Opinions, Vol. 8, p. 258.*)

"Here is not a grant of land along arbitrary lines unascer-"tained like those of unlocated railroads, not a grant at large in a "whole State; *but a grant within limits geographically determined by "the Act, and needing only surveys, according to established statute*

"*rules, to possess absolute precision of locality.*" If, then, the location of the grant of July 1st, 1864, was so definite, by the terms of the Act, as to conclude the State upon a given line, it follows that it was equally conclusive for purposes of notice to all subsequent grants, if such were necessary.

The Plaintiff in Error knew of the evidence of our grant and its exact *locus* when it finally located its line, and if with this knowledge it elected to locate in conflict, it certainly could not have been intended by Congress that, in order to hold its prior rights, the State of Kansas was required to run a race of diligence with it in the matter of filing maps, securing withdrawal, etc. Such a theory would reduce a legislative grant to the most uncertain tenure. We assert in our answer (p. 38 of Record) "that the route or line of said road was by the said Act definitely "fixed and determined." (The Record contains a typographical error as to the distance between the initial and terminal points. It has it "*eighty*-one miles," it should be *sixty* one miles.)

Hence I claim that our grant is so definite and specific in its limits and boundaries, that, certainly as against any other grant, it was in no sense a float, but was "a grant within limits "geographically determined by the Act, and needing only sur- "veys according to established statute rules, to possess absolute "precision of locality," and that the right to the land irrespective of the question of the definite location of the route by the railway company, "attached at once on the making of the "grant."

IV.

But if the first reservation of the Act of 1863, as announced by the Supreme Court of Kansas, embraces grants to other Companies of the same lands, made subsequent to the passage of the Act, and withdrawals thereunder, then, the same doctrine would operate against the Kansas Pacific Railway Com-

pany, and withdraw the lands embraced in our grant, and now in controversy, from the operation of their granting Acts.

The Act granting the lands to the State of Kansas, under which we claim, was approved *July 1st, 1864.*

The original Act subsidizing the Defendant in Error, was approved *July 1, 1862.* It contained a provision, excepting from the grant all lands within its limit, which "had been sold, "reserved or *otherwise disposed of," at the time the line of said road is definitely fixed. Sec. 3, Act of 1862.*

Our grant took effect July 1, 1864. There is no pretense that the "line of their road was definitely fixed," for more than two years thereafter. The language "otherwise disposed of," is very broad, and is not contained in the Act of 1863. The Court has determined that the right to these lands attached to the State of Kansas, "at once on the making of the grant." If we suppose that the lands in question were covered by the Kansas Pacific grant of 1862, the decision of the Court below, applied to the other side, absolutely withdraws them from the operation of that grant, because they had been "otherwise disposed of," at the time its line was definitely located. But as the lands are not within the range of that grant, and the withdrawal thereunder, reference is made to the Act of July 2d, 1864. By the terms of this Act, "any Company authorized by this Act "to construct its road and telegraph line from the Missouri "River to the initial point aforesaid, may construct its road and "telegraph line so as to connect with the Union Pacific Rail-"road at any point westwardly of such initial point, in case "such Company shall deem such westward connection more "practicable or desirable." The same aid was given for the construction of so much of the road as was a departure from its original route, subject to certain limitations. *Act July 2d, 1864, Sec. 10.*

In other words, if the Company thought it "practicable or desirable," it had the privilege of locating its line westwardly of

the "initial point" of the Union Pacific, and the privilege carried with it the land and bond subsidy. By the terms of the same Act, *Sec. 5*, the time within which to file its map was extended one year.

But this new grant contained the following emphatic condition:

SEC. 4. "And any lands granted by this Act, or the "Act to which this is an amendment, shall not defeat or impair "any pre-emption, homestead, swamp land, or *other lawful claim*," etc.

The Kansas Pacific Company, as before noticed, within the year prescribed, filed its map, but again designated its old route up the Republican.

The Act of 1866 authorized that Company "to designate "the general route of their said road, and to file a map thereof, "as now required by law, at any time before the first day of "December, 1866; and upon the filing of said map, showing "the general route of said road, the lands along the entire line "thereof, so far as the same may be designated, shall be "reserved from sale by order of the Secretary of the Interior. "*Provided*, that said Company shall be entitled to only the "same amount of the bonds of the United States, to aid in the "construction of their line of railroad and telegraph, as they "would have been entitled, if they had connected their said line "with the Union Pacific Railroad, on the one-hundredth "degree of longitude, *as now required by law*."

It is a very close question whether the Kansas Pacific ever had a grant of any lands up the Smoky Hill route—the one taken by authority of this last named Act.

The first authority to change the route from that first designated in the selection of 1862, was by the Act of July 2, 1864, in which the Company was required to file its map within one year designating its new route. But it failed to do this, so that, in the amendment of 1866 Congress recognizes the fact that its only

authorized route was that which should connect it with the Union Pacific Railroad, on the hundredth degree of longitude, "*as* (so the Act says) *now required by law.*"

The Act of 1866 certainly grants no lands. However this may be, I do not consider it necessary now to argue, for, if the Supreme Court of Kansas be correct, our grant of July 1, 1864, is absolutely exempted from the operation of *any grant* in favor of the Kansas Pacific, either by the terms of the original Act of July 1, 1862, or that of July 2, 1864. The statute of exemption is more specific, more certain and more comprehensive than the reservations under the act of 1863, and in express terms declares that no rights should attach in favor of that Company that had been "otherwise disposed of," or to which a "lawful claim" had attached.

As the Pacific grant of 1862 covered none of the lands in controversy, and as the grant of July 2, 1864, was made *subsequent* to our grant upon the condition that neither it "*nor the* "*Act to which it was an amendment* should defeat or impair any "pre-emption, homestead, swamp land or other *lawful claim,*" it is unquestioned, that the second grant was made *subject* to any and all rights the State of Kansas had acquired in the lands within the territorial limits of that grant. And there was abundant reason for this. The Kansas Pacific Company had procured the withdrawal of many millions of acres of land and held them from occupation, settlement or sale for two years. It desired to have the opportunity to change its route and, if it thought desirable, select another one, and appropriate other lands. Meanwhile other railway corporations had entered the field, seeking subsidies to build roads in other directions and had procured grants. It was quite proper that Congress should show some solicitude to defend other grants, while conferring additional privileges upon the Kansas Pacific.

By the very terms, therefore, of their alleged grant under the Act of 1864, the "lawful claims" the State of Kansas had ac-

quired in the lands covered by the grant of July 1, 1864, were absolutely excluded from the former grant.

While the Defendant in Error failed to avail itself of the privileges contained in the Act of July 2, 1864, as to changing its route, it is the only Act constituting a grant upon a route other than that selected under the Act of July 1, 1862. The Act of 1866 attempts to do nothing but authorize it to designate its general route and to file a map thereof as required by law, and thereupon the Secretary of the Interior was authorized to withdraw the lands upon the line of its new route. The Company and Congress recognized the fact that it had not the right to do this without the special permission of Congress. Their authority to do it under their original Act, or under the amendment of July, 1864, was absolutely gone. It had no right to, or interest in any route or in any lands except that right that it had acquired by a compliance of the terms of its original grant. Such route west of Fort Riley was only upon the route west of the Republican River, and did not embrace any of the lands in controversy.

It was only by virtue of the authority conferred by the Acts of 1864 and 1866, that it could select its route up the Smoky Hill. Before the passage of these Acts, or either of them, the State of Kansas had acquired its interest in the lands by virtue of the Act of July 1, 1864.

So that had there been no reservation in the Kansas Pacific grant, I respectfully insist that the State of Kansas had acquired such an interest in the lands by virtue of its prior grant, that Congress had no authority to impair it, unless permission was given to do so in clear and unambiguous terms in the grant to the State. But to settle the matter beyond any controversy, Congress did insert in the Kansas Pacific Act of 1864, "that any "lands granted by this Act, *or the act to which this is an amend-* "*ment*, should not defeat or impair" any "*lawful claim.*"

If, therefore, the doctrine of the Supreme Court of Kansas be correct, our grant was protected under the reservation of the

original Union Pacific Act, because the lands embraced therein had been "*otherwise disposed of*" at "the time the line of said road was "definitely located."

But if a doubt should arise under that Act, the reservation of all "lawful claims" under the Act of 1864, is an absolute protection to the interest the State had acquired by the grant to it, because it had clearly a "lawful claim" and excludes it from the operation of the Kansas Pacific grant. Hence it was not "reserved."

V.

The special authority given by the Act of July 3d, 1866, to the Secretary of the Interior, to withdraw the lands along the line of the new route of the Kansas Pacific, empowered him to reserve them "*from sale.*" What sales? Future sales, of course. Congress expressed no intention of attempting to interfere with sales that had been theretofore made. Any rights, inchoate or otherwise, that had been acquired or attached in favor of any other parties, were not affected in any sense, but only a reservation was made from the operation of any new grants, sales or settlements. Does any one suppose that this Congressional authority would have deprived a pre-emptor or homesteader, that had taken *but the first initial step* towards the entry of any portion of the lands embraced in the withdrawal, of his right to proceed under the land laws, and by a compliance with them, secure his patent?

The Kansas Pacific Company and Congress, in the passage of the Act, admitted that the former had acquired no interest in the lands prior thereto, else such legislation was unnecessary. The acquirement of such right was conditioned upon the performance of the Acts of 1862 and 1864, both as to manner and time. Our grant had been made more than two years before. Can it be contended, with any show of reason, that it was intended that this permission to reserve the lands "from sale,"

embraced those *already sold?* Such conclusion must be made to cover the lands in controversy, and as they were clearly embraced within the words of our granting Act, it is incumbent upon Defendant in Error to show this affirmatively and unequivocally. If, therefore, this authority to the Secretary of the Interior, does not, in words of plain interpretation, include the lands already granted, already sold, the reservation made in pursuance of this Act *did not embrace them.* In terms, and by any rule of legal construction, the statute could only have a prospective action, and in no sense a retro-active one. It would apply only to lands not granted, not sold. Hence, the lands in controversy *were not reserved*, and if the language in our reservation could be made to include reservations "for the purpose of "aiding in objects of internal improvement," it could not embrace these lands, for the very good reason that *they were not reserved.* Congress only intended to reserve lands not sold. It had no power to do otherwise. It was not honest to attempt to do otherwise. Admitting, then, that the construction placed upon the reservation in our grant, as interpreted by the Supreme Court of Kansas, is the correct one, and embraces the class that Court has declared, its decision was wrong, because the lands were *not reserved.* They had been already sold, and authority was only given to reserve "from sale," lands that were not sold.

Construed with the reservation contained in the Kansas Pacific amendment of July 2d, 1864, that all "lawful claims" were excepted from the operation of the grant, renders it absolutely certain that the lands embraced in our grant, and covered by the withdrawal of 1866, were not "reserved."

VI.

The grant by the Government and its acceptance by the State constituted a contract. The case clearly falls within the principle announced in *McGhee vs. Matthias, 4 Wallace, 143,* where the Court says:

"It is not doubted that the grant by the United States to "the State upon conditions and the acceptance of the grant by "the State constituted a contract. All the elements of a contract "met in the transaction—competent parties, proper subject mat- "ter, sufficient consideration and consent of minds."

This language the Court employed in deciding the grant of swamp lands from the United States to the State of Arkansas, the avails of which, so far as necessary, were to be devoted to the reclamation of the lands by levees and drains.

The elements of a contract in the law under consideration are very much stronger than in this comparatively gratuitous grant to the State of Arkansas. The Government doubles the value of its remaining lands, secures forever the free transportation of its troops and munitions of war over the railroad built under the grant, and brings into market and settlement lands before unsold and unsaleable, and ensures the rapid development of its unoccupied domain.

The contract has been beyond question highly advantageous to the Government, and its terms are to be construed by the ordinary and just rules established by Courts of the land.

In effect, the Federal Government said to the State of Kansas: "Grant is hereby made to you of certain lands out of the "public domain, provided you will, within ten years from the "date hereof, secure the construction of a railway through them, "over which the United States shall have extraordinary privi- "leges. Reservation, however, is made against the interference "of the occupation and settlement of the lands under the public "land system, and also for such uses as the public exigency shall "require, until the actual location of the line of your road, and "also that this grant shall not affect any heretofore made, and "shall not interfere with reservations existing at the passage of "the Act."

These terms the State promptly accepted. Can any one reasonably believe that in this proposition and acceptance, there

was contemplated for a moment, the reservation to the Government of the right to make another grant, covering the same lands, to another party, to build another railway in another direction? The idea is both absurd and monstrous.

If such had been the understanding of the grantee, would not steps have been taken to have located the line as soon as the grant became a law?

I respectfully insist that the following rules should govern in the adjustment of grants for the benefit of railroad companies:

1st. That the date of the definite location of the route fixed the legal right as between settlers and the railroad grant.

2nd. That as between conflicting railroad grants, precedence to title is conceded to a grant under the earliest statute, presuming its several requirements to have been complied with.

3rd. That in the absence of any statutory regulation governing such conflicts, the Courts are necessarily remitted to the common law rule of "*prior in tempore, potior est in jure.*"

The first of the foregoing is in accordance with the statute of March, 1854, before cited.

While as to the second, the direct question has not been determined by this Court, it has been by the law officers of the Government.

The attorney General in case of the Arkansas swamp lands, *9 Opinions, 254*, says:

"Where there is a conflict between two titles derived from "the same source, either of which would be good if the "other were out of the way, the elder one must always prevail.

* * * * * * * * * *

"The subsequen t grants by Congress to the State for the "use of the railroad could not have been intended to take away "from the State the rights previously vested in her for other "purposes. *We are never to impute such intentions to the legisla-"tive department when any other construction can be given to "the words of a statute.* Even if we could suppose that to be the

"meaning of Congress in this case, it would avail nothing to the "later grantee, since in all cases of conveyance a later grant "must yield to all earlier."

This common law rule must prevail in this case, unless the Court shall find as an affirmative proposition, that our Act contained an express provision that the Government reserved to itself the right to make other grants of the same lands, for the "purpose of aiding in objects of internal improvement."

No question is made but that all the requirements and conditions of the Acts of 1863 and 1864 were complied with, both as to the time and manner of performance. The Record shows, *p. 54*, affirmatively, that in June, 1870, the road was "accepted "by the Governor of Kansas and certified to the Secretary "of the Interior as having been completed in a good, substantial "and workmanlike manner as a first-class railroad, and the "same was, thereupon, accepted by the President of the United "States."

VII.

As all questions of fact involved in this controversy are specifically found by the *nisi prius* Court, made a part of the record, and no exception taken, the whole case is before this Court for final determination. Regarding the question decided by the Supreme Court of Kansas, as controlling, I have avoided reference to any other, thus far, in this discussion. But the petition of the Plaintiff, *pp. 21 and 22 of Record*, presents other reasons why "the action of said Secretary, in refusing to cause to be executed to Plaintiff a patent for said lands, and in certifying said lands to the State of Kansas, was wrongful, unlawful and oppressive," and I shall briefly notice them.

1st. "That the said State of Kansas had no claim to said lands under the Act of Congress of July 1st, 1864, because said State never did accept said Act." *Record, p. 21.*

The Act of the State of Kansas, approved February 9th, 1864, in accepting the grant of March 3d, 1863, (*ante, p. 8,*) provided, "That if the Congress of the United States shall, on "or before the 4th of March, 1866, consent that the Neosho "Valley Branch of the above named road, may be extended so "as to intersect the Union Pacific Railroad Eastern Division, at "or near Fort Riley, and shall make a grant of land for such "extension, of like amount with that granted per mile for the "construction of the herein above named principal road, then "said Atchison, Topeka & Santa Fe Railroad Company shall "proceed to construct such branch to such intersection, *on the "terms and conditions herein above described, applicable to the con-"struction of such main road.*"

This provision was a part of the formal acceptance of the grant made by Congress. The terms and conditions were unconditionally accepted by the State, and what had heretofore been a proposition on the part of Congress, became, by this Act, a contract between the United States and the State of Kansas. But the latter party went still farther and said in effect to Congress: "We desire that you make a further grant upon the same terms "and conditions, to aid in the construction of a road from the "point where the Atchison, Topeka & Santa Fe Railroad "crosses the Neosho River, so as to intersect the Union "Pacific Railroad Eastern Division, at or near Fort Riley." Congress promptly responded by passing the Act approved July 1st, 1864. So far as it was necessary to constitute the contract, it was quite immaterial from which party the proposition came, or which party assented thereto. The material fact is, whether there was substantially a proposition and acceptance.

The whole transaction and the Acts of the parties thereto, are to be construed together. The State, in the passage of the Act of February 9, 1864, while legislating for itself and its own interest, was also acting specially in behalf of the Atchison, Topeka & Santa Fe Railroad Company, the immediate bene-

ficiary under the Act of March 3, 1863. This Company, on the 16th day of February, 1864, passed the following resolution:

"*Resolved*, That the Atchison, Topeka & Santa Fe Railroad "Company hereby accepts the provisions of" an Act of the Legislature of the State of Kansas, entitled "an Act to accept "a grant of lands, made to the State of Kansas by the Congress "of the United States, to aid in the construction of certain "railroads and telegraphs in said State, and to apply the same "to the construction of such roads and telegraphs. Approved "February 9, 1864." (*See Record, p. 51.*)

Here, then, were the parties. The State of Kansas proposing to Congress to subsidize the link between Fort Riley and Emporia, upon the *same terms and conditions* as the Act of March 3d, 1863, had prescribed, and adding as a proviso to its acceptance, and making it one of the conditions imposed upon the Atchison, Topeka & Santa Fe Railroad Company, that, in that case, the latter should construct the road between those points; the latter Company agrees to the condition, and promises that it will build the road. This proposition, condition and promise are presented to Congress, and it passes the Act of July 1, 1864, and entitles it "an Act making an *additional* grant of "lands," etc. As the Act of March 3d, 1863, contained the only grant that had been made to the State, the last Act was "*additional*" to that grant.

To claim that such a state of facts required a *formal* acceptance by the State, of its own proposition, solemnly made, after it had been accepted by the other party, is to assert that the law is hypercritical, if not ridiculous. The law, if properly observed, is eminently practical. It regards the substance, and pays but little attention to mere forms.

The acts of the parties did not attempt nor contemplate a present grant of lands. The rule in *Rice vs. Railroad Company, 1 Black, 358*, has no application, as in that case, there was an

attempted transfer of the public lands, before the Government had made a grant.

2d. "Because the lands described and contained in said "lists and patents had been, on the 1st day of July, 1864, with- "drawn by competent authority, and reserved to the United "States, within the true intent and meaning of Section 1, in "the Act of Congress of 3d of March, 1863, to which refer- "ence is made for terms and conditions, in the aforesaid Act of "July 1, 1864."

The only withdrawal, at the time mentioned, in favor of the Plaintiff, was the one of July 31, 1862, and embraced that portion of lands, which, by the decree of the District Court of Morris county, Kansas, were adjudged to the Defendant in Error, (*Record, pp. 50, 51,*) and to which no exception was made. None of the lands in dispute before this Court, are embraced within the territorial limits of that withdrawal.

3d. "Because the State of Kansas has not constructed, or "caused to be constructed, a railroad, as required by the said "Act of July 1, 1864."

The State nowhere and at no time agreed to construct, or cause to be constructed, a railroad. But if it is intended to raise the question here that the railroad was not constructed in accordance with the provisions of the granting Act, I submit that it is a question of fact irrevocably settled.

The proper executive officers determined it when they decided that the lands belonged to the State of Kansas, for the purposes named in the Act of 1864.

The inferior Courts have not interfered with that finding, nor could they, as settled in *Johnson vs. Towsley, 13 Wallace*, unless the proper officers of the Government had been guilty of fraud or committed a mistake. *At page 53* of Record, is the

only finding before this Court upon this subject, and is a direct contradiction of the averment of the petition.

4th. This objection embraces the question in my main argument, but contains one complaint, to which I will give a passing notice, viz: "That the Defendant, in whose behalf the "Secretary so wrongfully certified said list of lands, was not "incorporated until long after the lands were reserved, as "aforesaid, for the benefit of the Plaintiff."

This is true as to the lines included within the withdrawal of July 31, 1862, to which no claim is here made by Plaintiff in Error. But in this connection much argument has been made by counsel for Defendant in Error, seeking to show that the transfer and assignment by the Atchison, Topeka & Santa Fe Railroad Company to the Union Pacific Railway Company Southern Branch, was void.

This instrument was duly executed by the proper officers of the respective corporations on the 19th day of March, 1866, they having been duly authorized thereto by the stockholders of said corporations respectively, and was duly approved and ratified by the Legislature of the State of Kansas on the 26th day of February, 1867.

So far as this controversy is concerned, it is quite immaterial whether or not the Atchison, Topeka & Santa Fe Railroad Company had authority to convey to the Union Pacific Railway Southern Branch Company, its franchises and rights so far as applicable to the route in question, upon the assumption of its duties, obligations and liabilities by the latter named Company. If it *had* the power, then the Pacific Southern Branch became invested with all its rights and privileges upon the performance of its conditions. If it had *not*, then the latter became, *pro hac vice*, the agent of the former, and entitled to such benefits and emoluments as the parties should determine or the Courts decree. This matter involves the two Companies and the State only, and

they have adjusted it. The proof shows that the Atchison, Topeka & Santa Fe Railroad Company performed all the conditions of its grant upon the main line. It further shows that the conditons of the grant upon the Neosho Valley Branch were fully performed.

The right of reversion to the Government upon the non-performance of the conditions of the grant was absolutely gone. The Government had nothing it could convey to any one. The condition of its grant had been performed, and it had accepted the railway as a full compliance. The substantial thing to be secured was the construction of the railway. If the Atchison, Topeka & Santa Fe Railroad Company had no power to transfer its rights, and be relieved of its liabilities, it certainly had the power to procure another party to perform its conditions. So, whether the Union Pacific Southern Branch Company constructed the railway, as the assignee of the first named Company, or as its agent, or by its procurement, is a matter of indifference to the Government or to the Defendant in Error. It is enough to show that all the conditions of the grant were performed, and that the State and Federal Government, as well as the two railway companies, have recognized and confirmed the arrangement under which it was done.

Section 15 of the Laws of Kansas, 1865, under which the Plaintiff in Error was incorporated, provided that "Such Com-"pany may acquire by purchase or gift any lands in the vicinity "of said road, or through which the same may pass, so far as may "be deemed convenient or necessary by said Company to secure "the right of way, *or such as may be granted to aid in the construc-"tion of said road.*"

Whatever question may arise as to the authority of the Atchison, Topeka & Santa Fe Railroad Company to transfer, or of the Union Pacific Southern Branch to receive, was settled by the ratifying Act of the legislature of February 26, 1867. Indeed, the only necessity for procuring such ratification was to

assure to the Plaintiff in Error that upon the construction of the road, upon complying with the conditions of the grant, that the State would convey to it the same subsidies that it had received for the benefit of the Atchison, Topeka & Santa Fe Railroad Company. The agreement was made by and between the stockholders of the two Companies, was ratified by the State, and recognized by the General Government. It was a valid agreement. But whether it was or not, is a matter of no importance in this controversy. The lands belonged to *some party* that had complied with the conditions of the grants of 1863 and 1864. They had been *earned* by parties who had complied with all of their provisions, and the question as to which of those parties should have received the patents, is not before this Court.

VIII.

It was argued in the Court below, that the Act of July 26, 1866, (*p. 52 of Record,*) repealed the Act of July 1st, 1864.

The answer to this is brief:

It is not claimed that it does so in express terms, but by implication.

Repeals by implication are not favored. "To repeal a "statute by implication, there must be such a positive repugnancy "between the provisions of the new law and the old, that they "cannot stand together or be consistently reconciled." [*Cool vs. Smith, 1 Black, 459; Wood vs. United States, 16 Pet., 342.*]

It is true that in some minor matters the Acts of March, 1863, and July, 1864, differ from the Act of July 26, 1866. But that difference pertained to details, and not in any manner to their general provisions. All of the Acts purported to make grants of lands to the State of Kansas to aid in the construction of a railroad. The two former had subsidized that portion of the proposed line only to that point where the Leavenworth, Lawrence & Galveston Railroad Company entered the Neosho Valley.

The latter extended the grant to the southern line of the State, "with a view to an extension of the same through a portion of "the Indian Territory to Fort Smith, Arkansas."

SEC. 8 provided that the Company was "authorized and "empowered to extend and construct its railroad from the "southern boundary of Kansas, south through the Indian Terri- "tory with the consent of the Indians, and not otherwise, along "the valleys of the Grand and Arkansas Rivers to Fort Smith, "in the State of Arkansas."

SEC. 9 provided, "That the same grants of lands through "the said Indian Territory are hereby made, as provided in the "first section of this Act, whenever the Indian title may be extin- "guished by treaty or otherwise, not to exceed the ratio per "mile granted in the first section of this Act," etc.

Additional privileges and subsidies were granted by this Act, but no conditions or obligations were imposed, nor provision inserted, that constituted in any sense a "repugnancy be- "tween the provisions of the new law and the old." It was simply an enlargement of the privileges and subsidies that had been theretofore granted.

If Congress had intended to repeal the Act of July 1, 1864, it was certainly easy and competent to have done so in direct terms. To show what Congress *did* think, I beg leave to call attention to the debate on the bill while pending in the Senate.

Vide Congressional Globe 1866, p. 3503 :

"Mr. Howard: I desire to inquire of the Chairman of "the Committee on Public Lands at what point this contem- "plated railroad is to commence, where it is to terminate, "and what is its probable length. I have not been able to "ascertain very accurately what the facts are in regard to these "matters. Where it goes I really do not know."

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"Mr. Hendricks: I will explain to the Senator, that three "years ago, March 3, 1863, there was a grant of land made to a

" railroad from Fort Leavenworth, by Lawrence, to the southern " boundary line of Kansas, in the direction of Galveston Bay. " In connection with that grant, there was a grant from Fort " Riley, running in a southeastern direction, to intersect that " road near the southern boundary of Kansas. Now, this bill " *repeats that grant simply, and brings it into one law,* and also " extends it from the road running from Lawrence, in a south- " ern direction, toward Galveston Bay. This bill extends the " Fort Riley road across that road to Fort Smith, in Arkansas, " so as to make a continuous railway from the Mississippi River, " by Little Rock to Fort Riley, thence in a southeastern " direction to Fort Smith, connecting with the Pacific road."

The grants of March 3d, 1863, and July 1st, 1864, covered only a short piece of road, not, perhaps, of sufficient magnitude and importance to invite and retain the attention and energies of capital. The Act of July 26th, 1866, was intended to remedy these objections, to enlarge the enterprise, and make it a trunk line, whose ultimate destination should be Galveston or the Mississippi River.

Other technical questions were presented by the Defendant in Error, but I do not regard them of sufficient importance to consume time or space in this argument.

CONCLUSION.

The legally constituted officers of the Federal Government have passed upon all the questions involved in this controversy, and have decided them in favor of the State of Kansas; and the State, in pursuance of the grant and the obligations it assumed in its acceptance, issued patents to the Plaintiff in Error. To overcome the legal effect of these acts of high authority, it is incumbent upon the Defendant in Error to show, in the most direct manner, that a fraud or mistake had been committed. There is no pretense of the former. As to the

latter, every presumption is to be resolved in favor of their findings of fact, and every one necessary to support their action, is to be presumed. There is no finding by the *nisi prius* Court, inconsistent, or in any sense at variance with the facts, that were necessarily found by the executive officers of the Government, in their official action. The legal questions involved, as I understand them, I have sought to present fairly to the Court.

I claim, therefore, in behalf of the Plaintiff in Error, that the Supreme Court of Kansas erred in decreeing the lands in question to the Defendant in Error, because—

1st. Our grant was prior in time to any grant in behalf of Defendant in Error that covered these lands.

2nd. That no portion of these lands were reserved by our grant in favor of any grant made subsequently thereto.

3d. That the withdrawal of July 11, 1866, in favor of Defendant in Error, operated only on lands that were legitimate subjects of "sale"; that these lands had been previously "sold," and hence were not included in the withdrawal and were not "reserved."

4th. That there was no intention on the part of Congress that the reservations in our grant should inure to the benefit of subsequent grants "for the purpose of aiding in objects of internal "improvement."

5th. That Congress made to the State of Kansas a grant of lands to aid in the construction of a railroad, which has been constructed and accepted by the Federal Government as a full compliance with the conditions of the grant; that its rights attached immediately upon the acceptance of the grant by the State. That the

State was required to do certain things which, in their nature, required time for completion; but when performed, they related back to the date of the grant, and the title was vested in her from that time.

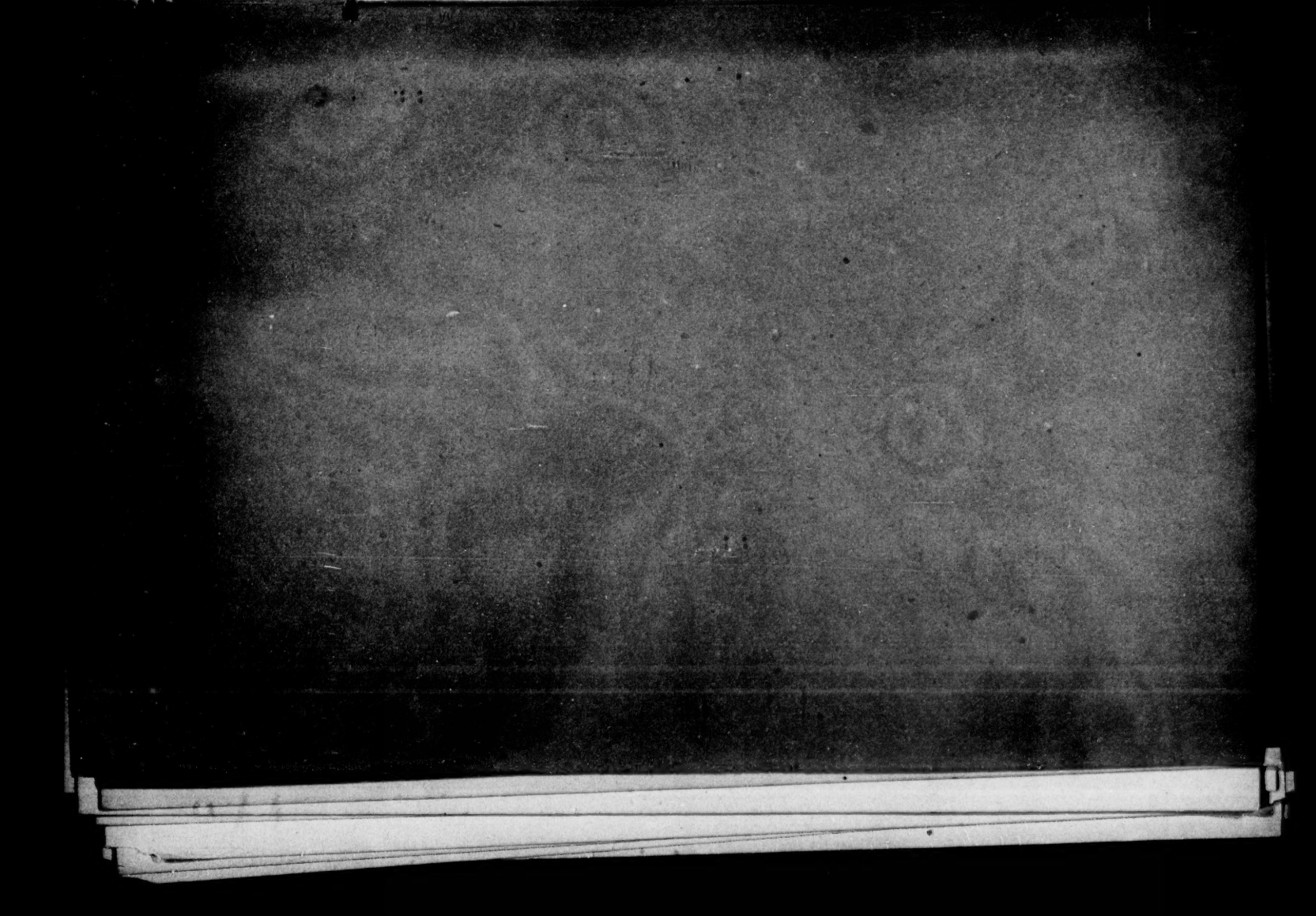
6th. That the interest the State of Kansas acquired by virtue of the granting Acts before mentioned, was a "lawful claim" within the meaning of the Kansas Pacific Act of July 2, 1864, and took lands embraced within the scope of the Kansas Pacific grants from its operation.

7th. That as against the State of Kansas the Defendant in Error never acquired any interest in the lands.

I therefore respectfully submit, that the judgment of the Supreme Court of Kansas should be reversed, and the judgment of the District Court of Morris County, Kansas, should be, in all things, affirmed.

T. C. SEARS,

Attorney for Plaintiff in Error.



In the Supreme Court of the United States.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,

vs.

KANSAS PACIFIC RAILWAY COMPANY.

ARGUMENT FOR DEFENDANT.

The defendant here on the 29th day of January, 1872, filed its bill in the Davis County District Court of Kansas against the present plaintiff, to compel it to execute a release and conveyance of certain lands which this defendant claimed by paramount title but which had been patented to the defendant by the Governor of Kansas on the 15th of January, 1873, the lands having been previously certified to the State of Kansas by the Commissioner of the General Land Office, as enuring to the State of Kansas by virtue of an act of Congress of July 1, 1864, hereinafter set out.

The Kansas Pacific Company by its bill made claim to said lands by virtue of the act of July 1, 1862, being "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes," and the several amendments thereto. So much of said acts as are necessary to establish the claim of the Kansas Pacific Company are as follows:

Act of 1862:

"Sec. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of *five* alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

Act of 1862:

"Sec. 9. *And be it further enacted*, That the Leavenworth, Pawnee & Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the one-hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri river to the Rocky Mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located

between the mouth of the Kansas river, as aforesaid, and the aforesaid point on the one-hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed in this act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas west of the meridian of Fort Riley, to the aforesaid point on the one-hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point on the one-hundredth meridian of longitude west from Greenwich, in the Territory of Nebraska."

Amended by second proviso in section 9, act of 1864, as follows:

"*And provided, further*, That any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific railroad at any point westwardly of such initial point, in case such company shall deeem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this act.

Act of 1864:

"Sec. 4. *And be it further enacted*, That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral lands," wherever the same occurs in this act, and the act to which

this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist; and such quantity for each settler who claims as a miner, as the said commissioner may establish by general regulations: *Provided, also*, That the phrase "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the center of the line of any one of said roads or branches mentioned in said act or in this act. And all lands shall be excluded from the operation of this act, and the act to which this is an amendment, which were located or selected to be located under the provisions of an act entitled "An act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, and notice thereof given at the proper land-office."

These sections make the grant of the lands in controversy. Other sections of the acts provide for the time and manner in which the road should be constructed, and when and how the company should be entitled to secure patents for the lands.

The seventh section of the act of 1862, contains the following:

"*Provided*, That within two years after the passage of this act said company shall designate the general route of said road as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry and sale."

An amendatory act was passed July 3, 1866. Section one of which is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Union Pacific Railway Company, Eastern Division, is hereby authorized to designate the general route of their said road, and to file a map thereof, as now required by law, at any time before the first day of December, eighteen hundred and sixty-six; and upon the filing of the said map, showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior: *Provided*, That said company shall be entitled to only the same amount of the bonds of the United States to aid in the construction of their line of railroad and telegraph as they would have been entitled to if they had connected their said line with the Union Pacific railroad on the one-hundredth degree of longitude as now required by law: *And provided further*, That said company shall connect their line of railroad and telegraph with the Union Pacific railroad, but not at a point more than fifty miles westward from the meridian of Denver, in Colorado."

The defendant in the court below sought to defeat the action and establish its title to the lands under three several acts of Congress, first the act of July 1, 1864, in which was incorporated the act of March 3, 1863. The first section of each of said acts are as follows:

Act of 1864:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and hereby is granted to the State of Kansas, to aid in the construction of a railroad and telegraph line from Emporia, via Council Grove, to a point near Fort Riley, on the branch Union Pacific Railroad, in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said road: *Provided*, that this grant shall be subject to all the provisions, restrictions, limitations, and conditions, in regard to selection and location of lands and otherwise, of an act of Congress approved March three, eighteen hundred and sixty-three, entitled 'An act for a grant of land to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State': *Provided*, That said railroad shall be a public highway and shall transport troops and munitions of war of the United States free of charge."

Act of 1863:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to the State of Kansas, for the purpose of aiding in the construction: * * Second. Of a railroad from the city of Atchison, via Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fe, New Mexico, with a branch from where this last-named road crosses the Neosho, down said Neosho Valley to the point where the first said first-named road enters the said Neosho Valley; every alternate section of land, designated by odd numbers, for ten sections in width on each side of said road and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from

the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by direction of the Secretary of the Interior, as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: *Provided*, That the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches: *Provided further*, That the lands hereby granted for and on account of said roads and branches severally, shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: *Provided also*, That no part of the land granted by this act shall be applied to aid in the construction of any railroad, or part thereof, for the construction of which any previous grant of land or bonds may have been made by Congress: *And provided further*, That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the route of said road and branches through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the President of the United States."

It was under these acts that the Commissioner of the General Land Office assumed to certify the lands to the State, but by his certificate the lands were certified subject to all the conditions of the act of July 1, 1864, and to any valid interfering rights which may exist to any tracts embraced in the list (Record, p. 11).

Upon the trial of the cause, the Judge allowed himself to be persuaded, and find that the Missouri, Kansas

& Texas Company had, or might possibly have some right to the lands under the act of July 26, 1866, the first section of which is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the Southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and except-

ed from the operations of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road."

Referring to the act of July 1, 1864, our first remark is, that it was never accepted by the State, unless the proviso to the act of February 9, 1864, of Kansas, shall be held to amount to such acceptance. It is a proviso to a statute contract proposed by that act, and accepted on the 4th of August thereafter, that being the day that the acceptance of the Atchison, Topeka and Santa Fe Company was filed in the office of the Secretary of State. (See pages 50-51 of Record.) The proviso declares that if Congress shall on or before the 4th of March, 1866, consent that the Neosho Valley Branch of the above named road (meaning the Atchison, Topeka & Santa Fe road) may be extended so as to intersect the Union Pacific Railroad, Eastern Division, at or near Fort Riley, and shall make a grant of land for such extension of like amount with that granted per mile for the construction of the hereinabove named principal road, then the Atchison, Topeka & Santa Fe Railroad Company shall proceed to construct such branch to such intersection on the terms and conditions within above prescribed applicable to such main road.

It is to be noted that Congress did not pass such an act. The act was for the construction of a line of road from Emporia by the way of Council Grove to a point near Fort Riley on the Branch of the Union Pacific Railroad in said State.

By Section 3 of the act of the Kansas Legislature of February 9, 1864 (set out in plaintiff's brief, pages 1-8), the Neosho Valley Branch of the Atchison, Topeka & Santa Fe Company was to leave the main line "where the said road crosses the Neosho, down said Neosho Valley," and the proviso in same section contemplated the assent of Congress that this Neosho Valley Branch might be extended so as to intersect the Union Pacific Railroad, E. D., at or near Fort Riley, and that Congress should make a grant of land for such extension. Emporia is at least a mile west of the Neosho River, and a grant from that place does not meet the proposed contract in the proviso. The first section of the Kansas act, February 9, 1864, accepts the grant of lands made by act of Congress of March 3, 1863, nothing more. The rest of that act proposes contracts for the disposition of those lands, to be accepted, by section 4, within six months after the passage of the act. The acceptance, by the Atchison, Topeka & Santa Fe Company was barely in time, but before it was accepted, namely on the 2nd of July, 1864, Congress had passed the amendatory act in behalf of the Union Pacific Railroad Company and branches. By no process of reasoning can it be held that the proviso to the Kansas act of February 9, 1864, was an acceptance of, or an agreement with the United States to accept the subsequent act of July 1, 1864. Because of that proviso to the proposed contract and its acceptance in August thereafter, if the act of Congress of July 1, 1864, had been in accordance with the proviso, the Atchison, Topeka & Santa Fe Company could have made reasonable claim upon the State to accept the act, and that is the most that can be made of it as against conflicting rights. But the State never did accept the act, nor does it ap-

pear that any application was ever made by either of the railroad companies to the State to accept it.

The Missouri, Kansas & Texas Company, on the 19th of March, 1866 (Record, p. 30-33), entered into a contract with the Atchison, Topeka & Santa Fe Company for a transfer of its rights down the Neosho Valley. On the 26th of February, 1867, the Kansas Legislature, by resolution, ratified that agreement, but the Missouri, Kansas & Texas Company had, before that ratification, on the 8th of August, 1866, accepted the terms, conditions and impositions of the act of Congress of July 26th, 1866, and had communicated the same to the Secretary of the Interior, on the 26th of December, 1866, two months before the Legislature of Kansas ratified the contract between the Atchison, Topeka & Santa Fe Company and the present plaintiff, which in the controversy with the United States respecting its land grant, (reported *2 Otto, p. 760*), made claim under the act of 1866. In respect to these several acts, the claim of the Kansas Pacific Company is:

First, That the act of the Kansas Legislature of February 9th, 1865, cannot be held to be an acceptance of the subsequent act of Congress of July 1, 1864.

Second, That the proposition of contract by the act of February 9th, offered to the Atchison, Topeka & Santa Fe Company, though accepted by that company on the 4th of August thereafter, whereby the proposition became a contract, did not impose upon the Atchison, Topeka & Santa Fe Company the duty of constructing a railroad from Emporia by the way of Council Grove to or near Fort Riley, because such a road was outside of the proposition contained in the proviso, and because the State had not accepted said act, and further because the Atchison, Topeka & Santa Fe Com-

pany had no power under its charter to construct such road, and because the Legislature could confer no such power under the constitution of the State. By article 12, section 1, of Constitution of Kansas, it is declared "The Legislature shall pass no special act conferring corporate powers." So that if the act of Congress had been in accordance with the proviso of the proposed contract, and if all objections of that character were aside, and if it be considered that the acceptance of the act did in form make a contract, such contract is absolutely void because the Legislature had no power to contract with the Atchison, Topeka & Santa Fe Company for the construction of such railroad. It was not possible for the Atchison, Topeka & Santa Fe Company under its charter to gain any right to the lands under the act of Congress, nor could the Legislature confer any such right. This being so, the subsequent resolution of the Legislature of Kansas, of the 26th of February, 1867, ratifying and confirming the contract of the 19th of March, 1866, between the plaintiff and the Atchison, Topeka & Santa Fe Company is entirely void, because:

First, The companies had no power to make any such contract; and

Second, Because the Legislature had no constitutional power to confirm and ratify the same by resolution.

Section 20 of Article 2 of the Constitution of Kansas declares: "The enacting clause of all laws shall be, 'Be it enacted by the Legislature of the State of Kansas,' and no law shall be enacted except by bill."

The resolution is not a law, and not being a law, it is without force or effect to transfer or authorize the transfer of the property of the State. But the argument need not be carried so far. Neither the act of February

9, 1864, nor the resolution of February 26, 1867, can be tortured into an acceptance by the State of the act of July 1, 1864, and no other party had the right to accept it.

That there was no grant until the act was accepted, cannot be disputed, for by the 3rd and 5th sections of the act of March 3, 1863, incorporated into the act of July 1, 1864, "Said railroad and branches shall be and remain public highways for the use of the Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States," and "The United States mail shall be transported over said road and branches, under the direction of the Post Office Department, at such prices as Congress may by law direct; *Provided:* That until such price is fixed by law, the Post Master General shall have the power to determine the same." The meaning of these provisions has already been passed upon by this Court. *93 U. S., 442, A. T. & S. F. Co.* v. *United States.* There is no presumption that such a grant is accepted by the grantee. *3 Washburn on Real Property, 297.*

The grant of 1864, not having been accepted by the State, left the whole matter open for Congress to pass the act of July 26, 1866. That act, section 7, required the acceptance of the company. The condition upon which the grants were made (section 3), was, (1), that the company should keep the road in repair and use; (2), that it should at all times transport troops, &c., free from all cost or charge therefor to the Government, when required to do so by any department thereof. The right of way was fixed 200 feet in width (section 6), and by the same section there was granted the necessary ground for station buildings, workshops, depots, &c.

By section 1, the indemnity lands were to be of odd and even numbered sections. In all, the act of 1866 made much more extensive grants to the company, and imposed by far larger duties upon the company, especially in its obligation to maintain the road and supply transportation to the Government without cost.

It would seem to be preposterous to contend that it was the intention of Congress to provide for the construction of two roads in the same vicinity, and reasonably it must be held that it was the intention of Congress to make the act of 1866 the only act to secure that object, and so the M. K. & T. Company must at the time have intended.

In the controversy with the United States for the Osage Lands, its claim was under the act of 1866, but because by that act it was impossible to certify the lands in controversy to the M. K. & T. Company, and seemingly it having been determined by the Department to bestow the lands upon that company, *nolens volens*, resort was necessarily had to the act of 1864. It was in vain to think of the act of 1866, because it had not been accepted, and so become a contract, until after the withdrawal of the lands for the Kansas Pacific Company. And the wretched pretext that the Kansas Pacific Company had no grant beyond Fort Riley, was resorted to, to enable the Department to carry out its purpose of certifying the lands to the State for the M. K. & T. Company. And now, unless it shall be decided that the lands in controversy are embraced in the grant of 1864 or 1866, the decree must stand, for the Supreme Court of Kansas has decided in favor of the validity of the grants to the Kansas Pacific Company, and the statutes making those grants are not open to review here.

So far the endeavor has been to show that nothing can be taken by virtue of the act of 1864, because it was not accepted, nor by the act of 1866, because the lands were reserved at the time of the passage and acceptance of the act; but we need not rest the case here, but can safely stand upon the decision of the Supreme Court of Kansas.

Under the act of 1862, the Kansas Pacific Company, on the 17th of July thereafter, filed its map of its proposed route of road. (See finding of facts, Record 44.) The lands were withdrawn, according to that map, on the 31st of July, 1862, which withdrawal embraced all the lands in town 13, ranges 3, 4, 5, 6, 7 and 8, East; all the east half of town 12, range 2, East; and in town 12, ranges 3, 4, 5, 6, 7 and 8, East (Record, p. 45). These lands are more particularly described on record, pages 61-64, making 28,704$\frac{41}{160}$ acres. These lands were decreed to the Kansas Pacific Company, and that decree has never been appealed from or error prosecuted to it. The lands, as before stated, were withdrawn July 31, 1862, under the act of July 1, 1862. Afterwards, on the 11th day of July, 1866, the Kansas Pacific Company having filed its map, under the act of July 3, 1866, the Secretary of the Interior directed a withdrawal of all the lands in controversy, which withdrawal was consummated on the 26th of that month (Record, pages 45-46). So that from that date none of these lands were subject to pre-emption, private entry or sale. They were withdrawn by competent authority, reserved by the United States for the purpose of aiding the Kansas Pacific Company in the construction of its road. #

Mr. Justice BREWER, pronouncing the opinion of the Supreme Court of Kansas, referring to the following words in the acts of March 3, 1863, and July 26, 1866:

These withdrawals and reservations were made several months before the plaintiff in error commenced the survey of its line for definite location. The survey was commenced in September 1866 (record p 53) and map of definite

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"But in case it shall appear that the United States, when the lines or routes of said road and branches are definitely fixed, have sold any section or part thereof granted as aforesaid, or the right of pre-emption or homestead settlement has attached to the same, *or that the same has been reserved by the United States for any purpose whatever*, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from," &c., and defines them as words of "*limitation*" of the grant. This is very happily stated, for the foregoing words constitute a conditional limit on the grant. *1st Washburn, 261.* To be very critical, it might be designated a contingent limitation. *2d Washburn, 624.* But it is quite immaterial what definition is given to these words of the acts. This Court, in the celebrated case of *Leavenworth, &c., R. R. Co.* v. *United States, 92 U. S., 733*, gave construction to these acts in both the prevailing and dissenting opinion, substantially the same. Mr. Justice DAVIS, *p. 748*, says:

"Private entries, pre-emption and homestead settlements, *and reservations for special uses*, continued within the supposed limits of the grant, the same as if it had not been made. But they ceased when the routes of the roads were definitely fixed; and if it then appeared that a part of the lands within those limits had been either sold at private entry, taken up by pre-emptors, *or reserved by the United States*, an equivalent was provided."

Mr. Justice FIELD, *p. 756*, says:

"There were two reservations in the act—one general and the other special, the latter being in the proviso. The general reservation only excepted from the operation of the grant, lands which, at the time the line of the road and its branches was definitely fixed, were sold or reserved, or to which the right of homestead or pre-emption settlement had then attached.

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when the route of the road was established; but, as this might take years, the Government did not in the meantime withhold the lands from settlement and sale, upon any notion that the route might possibly pass through or near them. It kept the lands generally open to the settler or pre-emptor, *and subject at all times to appropriation for public uses.* And the object of the general reservation mentioned was to provide for the possible acquisition of interests in this way to lands falling within the limits of the grant. When they did so fall, other lands in their places were to be selected. It was only when the route was definitely fixed that the right of sale or settlement *or reservation, ended*, and the title, previously floating, attached to the land subject to the grant."

The interpretations of these acts by this Court in the case cited, are believed to be conclusive in support of the decision of the Supreme Court of Kansas, and though the clause of the first section of the act under consideration is not preceded by words of exception or reservation, yet it coheres in, and qualifies the grant, and is declared to be an exception or reservation.

In Schulenberg's case, *21 Wall., 62*, Justice FIELD says:

"A legislative grant operates as a law as well as a transfer of the property, *and has such force as the intent of the Legislature requires.*"

Without resorting to the last proviso of the first section of the act of 1863, which excepts reservations theretofore made, we rest the case upon the limitation and reservation contained in the granting clause of the section. Some claim is made by plaintiff in error that the acts of July 1, 1864, and July 26, 1866, make grants of land in place. This claim cannot be maintained; upon plaintiff's demand the Secretary has held that "at or near Ft. Riley" was Junction City, three miles west, and with the same propriety he could have held that it was Ogden, five miles east of the Fort. The line of road

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adopted by the plaintiff in error is not from the Fort via Clarke's creek, as defined in its charter. It is evident that no one could declare what lands would be claimed under the grant until the road was located. It might have been so located as to exclude all of the lands in question from the grants, though the acts were in force. If the K. P. company had built by the Republican, the connection must have been at or east of the Fort.

The case of the Kansas Pacific Company is briefly this: By the act of July 1, 1862, it had a grant of ten alternate sections to the mile, designated by odd numbers. By the act of July 2, 1864, the grant was increased to twenty alternate sections, extending twenty miles from the line of the road on either side. At first, the company contemplated reaching the hundredth meridian, by the way of and on the east bank of the Republican river, and procured a withdrawal of the lands in that direction, but the President did not approve of that route. By the 9th section of the act of 1864, the company secured the right to unite with the Union Pacific Company at any point west of the hundredth meridian. The company determined to change its route by the Smoky Hill. The Secretary of the Interior, though he had the right, as was determined in the Des Moines cases, refused to make a withdrawal of the lands, not being then required to do so by the seventh section of the act of 1862. That made it necessary for the company to apply to Congress, which it did, and procured the passage of the act of July 3, 1866. The last proviso to the first section is: "*And provided further*, That said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver, in Colorado." This sec-

tion (as well as did the 9th section of the act of 1864), conferred the power and right upon the company to adopt its own line, without the intervention of the President, and required the Secretary of the Interior, upon the application of the company, to make a withdrawal of the lands along its route. In pursuance of this law, the withdrawal of the lands in controversy was made on the 26th day of July, 1866. What particular lands are within the ten mile limit, and embraced in the grant of 1862, does not appear in the record, but they were all withdrawn, and enured to the Kansas Pacific Company upon the construction of its road adjacent to said lands. The road was constructed and accepted by the President on the 22nd day of January, 1867, who then made an executive order to the Secretary of the Interior, to convey these lands to the Kansas Pacific Company. Words need not be wasted in arguing that the Secretary of the Interior wholly mistook the effect of the several acts of Congress under which the Kansas Pacific Company makes its claim.

It is plain that by these acts the lands claimed by that company, from one end to the other of its road, were granted to the company in aid of its construction, and the reason given by the Secretary for withholding the patent to the Kansas Pacific Company, that there was no grant beyond Fort Riley, because the President had not approved the route of the road beyond that point, is too preposterous to be answered unto.

The plaintiff in error in a very critical endeavor to show that the withdrawal of the lands pursuant to the act of July 3, 1866, did not have the effect to take them out of the supposed grant of July 1, 1864, in favor of the State, has argued that the lands withdrawn by virtue of that act, were not reserved by the [illegible]

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States for any purpose whatever so as to defeat the grant to the State, because the lands were not reserved for the use of the United States. The argument is too subtle to be appreciated. The plain meaning of the limitation or reservation in the act, is, that Congress reserved to itself the right to make whatever disposition of the lands it pleased, at any time before the definite location of the railroad, to aid in the construction of which the act was passed.

Again, it has been argued that by the act of 1864, granting additional land to the Kansas Pacific Company, it is provided that said act shall not defeat any valid right, wherefore the Kansas Pacific Company was not entitled to any lands that might have been embraced in the grants of July 1, 1864, and of July 26, 1866, but this argument is a begging of the question. It assumes that by those acts valid rights had been secured to the State and the Missouri, Kansas & Texas Company, whereas they had no right to those lands, unless they should remain unreserved and unappropriated when the road was definitely located. Before that was done they were reserved, and so excepted out of the grant.

The right of the plaintiff in error depends upon the value of the patent of the State to it. It has been sufficiently shown, it is believed, that the State did not have the right to acquire any title to these lands. That by the proviso to its act of February 9, 1864, it did not accept the subsequent act of Congress of July 1, 1864. Neither could that proviso be declared to vest any right in the Atchison, Topeka & Santa Fe Company to lands in which the State as yet had no right.

Rice v. *Railroad Co.*, *1 Black.*, *358*.

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withdrawal and reservation of the lands, July 26, 1866, for the Kansas Pacific Company pursuant to the act of Congress a "*reservation by the United States for any purpose whatever?*" The Supreme Court of Kansas has decided that it was. The question is, did that Court err?

J. P. USHER,
Attorney for Defendant.